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No. 02-1674 *et al.*

IN THE

Supreme Court of the United States

MITCH MCCONNELL *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,

Appellees.

On Appeal From The United States District Court For The District of Columbia

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENTS

VOLUME III

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III. CONCLUSIONS OF LAW

I find it most appropriate to discuss BCRA's Title II first, before turning to my discussion of Title I, and the other remaining provisions of BCRA that are addressed in this opinion.

I. Title II: NONCANDIDATE CAMPAIGN EXPENDITURES

Sections 201, 203 and 204: The Prohibition on Electioneering Communications

The McConnell, NRA, Chamber of Commerce, NAB, and AFL-CIO Plaintiffs all challenge the prohibition on corporate and labor disbursements for electioneering communications. These Plaintiffs also challenge both definitions of 'electioneering communication' (the primary definition and the fallback definition).

As discussed in the *per curiam* opinion, FECA Section 441b prohibits corporations and labor unions from using their general treasury funds on contributions or expenditures in connection with a federal election. 2 U.S.C. § 441b. Sections 203 and 204 of BCRA extend this prohibition to 'electioneering communication.' BCRA provides for two definitions of electioneering communication—a primary definition and a backup definition to be substituted in the event the main definition is held to be constitutionally infirm. Given the uncontroverted record of abuse and circumvention of the longstanding prohibition of Section 441b, I find the primary definition of electioneering communication, and the corresponding restrictions in sections 203 and 204, constitutional. As a result, I find BCRA's restriction on the ability of corporations and labor unions to spend general

treasury funds on electioneering communications to be facially constitutional as a matter of law, including its application to section 501(c)(4) and section 527(e)(1) corporations that do not receive an *MCFL* exemption.

As my opinion on the constitutionality of the primary definition does not command a majority, I am cognizant that the majority who have found the primary definition unconstitutional must tackle the constitutionality of the backup definition of electioneering communication. To that end, I concur in the judgment reached by Judge Leon's opinion on this question. Accordingly, the final judgment of the three-judge District Court panel reflects my support of his opinion as an alternative to my own finding that the primary definition of electioneering communication is constitutional. Given my view of the constitutionality of the primary definition, I have no further occasion to consider the constitutionality of the backup definition.

A. *Introduction*

For close to one hundred years the political branches have made the choice, consistent with the Constitution, that individual voters have a right to select their federal officials in elections that are free from the direct influence of aggregated corporate treasury wealth and-for over fifty years-free from the direct influence of aggregated labor union treasury wealth. The rationale for the prohibition is simple, persuasive, and longstanding. First, such a restriction 'ensure[s] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions.' *FEC v. Nat'l Right to Work Comm. ('NRWC')*, 459 U.S. 197, 207 (1982). Second, such a prohibition 'protect[s] the individuals[,] who have paid money into a corporation or union for purposes other than the support of candidates[,] from having that

money used to support political candidates to whom they may be opposed.' *Id.* at 208. In other words, when corporations and labor unions spend their general treasury funds to influence federal elections, our coordinate branches have stated that they must use segregated funds voluntarily and deliberately committed by individual citizens for that purpose.

Since 1996, this longstanding prohibition has become a fiction, with abuse so overt as to openly mock the intent of the law. The record persuasively demonstrates that corporations and unions routinely seek to influence the outcome of federal elections with general treasury funds by running broadcast advertisements that skirt the prohibition contained in section 441b by simply avoiding *Buckley*'s 'magic words' of express advocacy. In enacting Title II, Congress responded to this problem by tightly focusing on the main abuse: broadcast advertisements aired in close proximity to a federal election that clearly identify a federal candidate and are targeted to that candidate's electorate. In devising Title II, Congress has returned to a regime where corporations and labor unions must use federal money from a separate segregated fund explicitly designated for federal election purposes when seeking to influence federal elections.[109]

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[109] In this manner, Title II neatly dovetails with the nonfederal funds prohibitions contained in Title I. Whereas the political parties have expressed their frustration that Title I will diminish their importance relative to special interest groups, *see, e.g.*, RNC Br. at 13, Title II ensures that these special interest organizations, except those explicitly qualifying for *MCFL*-status, will have to run broadcast advertisements that influence a federal election with the same federal dollars that the political parties will have to use to pay for their advertisements (except that BCRA increases the amount of federal money that the parties can raise relative to their special interest counterparts).

Indeed, the record conclusively establishes that the 'magic words' of express advocacy identified in *Buckley* are rarely used in any form of electioneering advertisements in the modern political campaign. Findings ¶ 2.3. The perverse consequence of this situation is that advertisements that avoid express advocacy are not only the type of advertisements that political consultants generally employ for their candidate clients, they are also precisely the advertisements that corporations and labor unions, prior to BCRA, were permitted to run. Accordingly, as the record demonstrates, corporations and labor unions, with minimal effort, were able to influence federal elections with their general treasury funds; a practice long prohibited by Congress and contrary to that enforced by the judiciary.

It is for these reasons, particularly given the overwhelming record in this case, that I find facially constitutional the prohibition in Title II on corporations and labor unions using general treasury funds for electioneering communications.

B. *Standard of Review*

Plaintiffs first contend that both *Buckley* and *MCFL* foreclose any Congressional regulation of speech that does not constitute express advocacy, and as a result, Title II fails as a matter of law because BCRA's restrictions on electioneering communication apply to broadcast advertisements that do not contain express advocacy. McConnell Br. at 51 ('*Buckley* and *MCFL* condemn Congress' regulation of speech that does not constitute express advocacy.'). In other words, Plaintiffs posit that the Court does not even need to reach the question of whether BCRA is narrowly tailored to serve a compelling governmental interest, because both *Buckley* and *MCFL* announce a substantive rule of constitutional law; namely, that Congress may not regulate any speech that does not qualify as express advocacy as that term has become known.

As a matter of law, and as discussed *infra*, I find Plaintiffs' argument on this point unpersuasive. Neither *Buckley* nor *MCFL* create a rule of substantive constitutional law whereby Congress can only regulate political speech containing words of express advocacy. Rather, *Buckley* and *MCFL* used the express advocacy standard as a means of construing otherwise unconstitutionally vague portions of FECA. As I do not view *Buckley* and *MCFL* as prohibiting future Congressional regulation of political speech, I reach the question of whether BCRA is narrowly tailored to serve a compelling governmental interest.

In turning to that question, it bears pointing out that the parties argue in their briefing about who bears the 'burden' in this litigation, with each side pointing the finger at the other. *Compare* Gov't Br. at 131 ('[Plaintiffs] efforts to shoulder [their] burden all fail.') *with* McConnell Reply at 32 ('Defendants incorrectly argue throughout their briefs that *plaintiffs* bear the burden of demonstrating that BCRA's ban on electioneering communications is overly broad.') (emphasis in original). Throughout this litigation, Defendants argue that Plaintiffs bear a burden of demonstrating that the law is substantially overbroad. Defendants contend that as Plaintiffs bring a facial challenge to these sections of BCRA, they must establish that the prohibition on corporate and labor union spending of general treasury funds on electioneering communications is substantially overbroad. *See Ashcroft v. ACLU*, 122 S.Ct. 1700, 1713 (2002); *Ashcroft v. The Free Speech Coalition*, 122 S.Ct. 1389, 1398-99 (2002). As the Supreme Court instructed in *Broadrick v. Oklahoma*, 'the Court has altered its traditional rules of standing to permit-in the First Amendment area-attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (internal quotation marks and citation omitted).

Plaintiffs wait until their reply briefs to address Defendants' salient argument on this point. McConnell Reply at 32, Chamber/NAM Reply at 4-5. Plaintiffs essentially argue that there are two kinds of facial challenges under the First Amendment. The first, involves statutes that injure 'third parties,' and involves the *Broadrick* line of cases. Chamber Reply at 4. The second facial attack is where 'a plaintiff invokes its own First Amendment rights in a way that subjects a statute to strict scrutiny.' Chamber/NAM Reply at 5 (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 381 & n.3 (1992); *Sec'y of State of Md. v. Joseph H. Munson, Co.,* 467 U.S. 947, 965-66 & n.13 (1984)). Plaintiffs argue that they belong in this latter category.

The difficulty with Plaintiffs' position, however, is that none of their submissions describe in specific detail any advertisements, referring to particular candidates in any races, that Plaintiffs intend to produce or air at any time in the future, and that would fall within BCRA's electioneering communication provisions. As such, it is difficult to argue that Plaintiffs have demonstrated affirmatively and concretely, in any kind of detail, the scope of their claimed First Amendment injuries.

Nevertheless, none of the parties dispute the fact that the framework for reviewing the constitutionality of these sections is strict scrutiny. Tr. at 252 (Waxman) ('The standard is strict scrutiny, there's no doubt about it. This is political speech. This is core political speech.'). Moreover, a number of Plaintiffs do have a history of using corporate and labor union general treasury funds to pay for electioneering communications.

In practical terms, given the way Defendants have argued this case, the debate over the 'burden' is largely academic. Defendants present their Title II arguments by primarily demonstrating that the law meets a strict scrutiny test. Indeed, to some degree, Defendants have essentially conflated the

strict scrutiny and substantial overbreadth inquiries. *See* Tr. at 251-52 (Waxman) ('And that brings us to the real constitutional issue, whether the burdens that Congress' new law imposes on speech are narrowly tailored to serve compelling public interests; or, more precisely, again because this is a facial challenge, whether plaintiffs have demonstrated that the new provisions are substantially overbroad in relation to their legitimate goals.'). Furthermore, as I find that the provisions in Title II are constitutional under this strict scrutiny review, the question of which party bears the burden is also largely irrelevant. Consequently, although I am convinced that Plaintiffs have not demonstrated that the 'electioneering communication' provisions in Title II are substantially overbroad, I analyze the law under the strictscrutiny framework consistent with Defendants' presentation in their briefing.

In undertaking this latter analysis, I will examine whether BCRA's restrictions on electioneering communications are narrowly tailored to serve a compelling public interest. Under this strict scrutiny review, I find that the restrictions on corporate and labor union spending on electioneering communications are constitutional at this facial challenge stage, meaning that BCRA's restrictions on political speech are narrowly tailored to serve a corresponding compelling governmental interest.

The remainder of my opinion on this question is divided into four parts. The first section contains my reasons for finding that express advocacy is not a constitutional requirement. On this point, I am joined by Judge Leon and therefore speak for the Court. The second portion provides my dissenting view that the primary definition of electioneering communication is narrowly tailored to serve a compelling governmental interest. In the third and fourth sections, I write for the Court and discuss my reasons for concluding that Plaintiffs' underbreadth argument and Plaintiffs' challenge to the 'media exemption' both lack merit.

C. *Express Electoral Advocacy is Not a Constitutional Requirement*

1. The Origins of the Express Advocacy Test

I conclude that in the context of regulating federal elections, Congress may restrict corporate and union spending on political speech which does not contain words of express electoral advocacy, provided that such restrictions are narrowly tailored to serve a compelling governmental interest. In condemning Title II, Plaintiffs insist that *Buckley* announced a substantive rule of constitutional law, such that Congress is forever prohibited from regulating any political speech that does not contain explicit words of express advocacy-even if the political speech being regulated is paid for with corporate or labor union general treasury funds. McConnell Opp'n at 38 ('*Buckley* thus leaves no doubt that its expressadvocacy test is a constitutional requirement.'). Plaintiffs provide very little textual analysis of the *Buckley* and *MCFL* decisions and instead overstate the extent of the *Buckley* holding to satisfy their purpose.

In reviewing Title II, it should be noted that none of the parties dispute the fact that the electioneering communication restrictions in Title II regulate more political speech than just express advocacy. Therefore, if I conclude that the express advocacy standard is forever enshrined in the Constitution, then the restrictions on electioneering communications in Title II would be condemned as a matter of law before any analysis of substantial overbreadth is even performed. In taking a step back and analyzing *Buckley* and *MCFL*, it becomes apparent, however, that the express advocacy standard devised by the Supreme Court in *Buckley* is not a substantive rule of constitutional law that operates as a *per se* restriction on future Congressional action.

In *Buckley*, the Supreme Court considered a provision of FECA that limited the amount of money individuals and

certain groups could independently expend 'relative to' a clearly identified federal candidate.[110] *See Buckley*, 424 U.S. at 39-51 (discussing section 608(e)(1) of FECA). Section 608(e)(1) of FECA provided that '[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year *advocating the election or defeat of such candidate*, exceeds $1,000.' *Id.* at 39 (omission in original) (emphasis added). Prior to directly considering the constitutionality of section 608(e)(1), the Supreme Court stated that '[*b*]*efore* examining the interests advanced in support of [the provision's] expenditure ceiling, consideration must be given to appellants' contention that the provision *is unconstitutionally vague*.'' *Id.* at 40 (emphasis added).

In undertaking the vagueness inquiry, the Supreme Court was particularly troubled by the phrase 'relative to' as it appeared in the provision under consideration. *Id.* at 40-44. Observing that the law did not define the phrase, the Supreme Court found that '[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech unless other portions of [the provision] make sufficiently explicit the range of expenditures covered by the limitation.' *Id.* at 41-42. Interpreting the phrase in its context, the Supreme Court stated that the 'context clearly permits, if indeed it does not require, the phrase 'relative to' a candidate to be read to mean 'advocating the election or defeat of' a candidate.' *Id.* at 42.

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[110] More specifically, this provision in FECA 'prohibit[ed] all individuals, who are neither candidates nor owners of institutional press facilities and all groups, except political parties and campaign organizations, from voicing their views 'relative to a clearly identified candidate' through means that entail aggregate expenditures of more than $1,000 during a calendar year.' *Buckley*, 424 U.S. at 39-40.

Accordingly, the Supreme Court, used the context of the provision to make a 'first-cut' at construing the vague phrase 'relative to.'

Even with this clarification, however, the Supreme Court found that the vagueness inquiry was merely 'refocuse[d]'' and, thus, not completely resolved. *Id.* at 42. Confronted with the challenge of interpreting 'advocating the election or defeat of a candidate' the Supreme Court was once again concerned about an interpretation of the wording of the statute that covered more speech than was actually necessary. The Supreme Court remarked that:

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various issues, but campaigns themselves generate issues of public interest.

Id. In other words, the Supreme Court found that even if it was permissible to construe the phrase 'relative to' as the equivalent of 'advocating the election or defeat of a candidate,' the vagueness inquiry was not complete because such a construction did not provide a bright line between permissible speech and impermissible speech and had the potential to cause speakers to self censor genuine issue discussion in order to avoid violating the statute.[111]

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[111] The McConnell Plaintiffs seize on this quotation as immutable proof that express advocacy is somehow chiseled in stone as a constitutional requirement. McConnell Opp'n at 34 (Buckley's adoption of this bright line test 'was not merely an exercise in statutory construction.'). However, as is clear from the context in which this quotation was made, the Supreme Court in making this statement was observing that the phrase 'relative to' could not be remedied by a simple reference to the context of the provision, but rather, needed further narrowing before the vagueness concerns would be ameliorated.

In fact, to underscore its apprehension that its first narrowing construction was not satisfactory, the Supreme Court quoted a passage at length from *Thomas v. Collins*, 323 U.S. 516, 535 (1945):

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas*, 323 U.S. at 535). To satisfy its concerns, therefore, the Supreme Court further construed section 608(e)(1) to apply 'only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.' *Id.* at 44. In a footnote, the Supreme Court observed that '[t]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'' *Id.* at 44 n. 52. These phrases have come to be known as the 'magic words,' *see* Findings ¶ 2.1.1, because a communication that invokes one of these words

unquestionably qualifies as express advocacy and falls within the ambit of FECA. Notably, even with this narrowing construction, the Supreme Court struck down section 608(e)(1) as unconstitutional under the First Amendment. *See id.* at 44-51.

The Supreme Court also imported the 'express advocacy' requirement into another provision of FECA that it found unconstitutionally vague. Section 434(e) of FECA required individuals and certain groups to disclose contributions and expenditures. Contributions and expenditures were each defined in terms of the use of money or other valuable assets 'for the purpose of influencing' the nomination or election of candidates for federal office. *Id.* at 77. The Supreme Court found that the phrase 'for the purpose of influencing' was unconstitutionally vague. *Id.* ('It is the ambiguity of this phrase that poses constitutional problems.'). Finding no legislative history to help guide the statutory analysis, the Court turned to construing the disclosure provision in such a manner so as '*to avoid the shoals of vagueness.*'' *Id.* at 78 (emphasis added).

When attempting to construe the phrase in relation to expenditures, the Court encountered 'line-drawing problems.' *Id.* To resolve this difficulty, the Supreme Court, again, interpreted the phrase in the same manner in which it had interpreted the vague portion of section 608(e)(1). *Id.* at 79 ('Although the phrase, 'for the purpose of . . . influencing' an election or nomination, differs from the language used in § 608(e)(1), it shares the same potential for encompassing both issue discussion and advocacy of a political result.'). As a result, the Supreme Court found that '[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of s 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.' *Id.* at 80. So construed, the

Supreme Court held that section 434(e) was narrowly tailored to serve a sufficiently important governmental interest. *Id.* at 80-82.

Ten years later in *MCFL*, the Supreme Court again invoked the express advocacy test. *MCFL*, 479 U.S. at 248-49. In doing so, the Supreme Court gave insight into the reasoning behind the origins and purpose of the express advocacy test. The *MCFL* Court wrote that in *Buckley*, 'in order to avoid problems of overbreadth, the Supreme Court held that the term 'expenditure' encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'' *Id.* (quoting *Buckley*, 424 U.S. at 80). With this in mind, the Supreme Court turned to the question before it, which was whether the term 'expenditure,' as used in section 441b, was again vague. Having found that *Buckley* had adopted the express advocacy construction for the term 'expenditure' in the provision requiring disclosure of independent expenditures, it is not surprising that the Court found the term 'expenditure' for purposes of section 441b to also require the express advocacy construction. *Id.* at 249 ('We agree with appellee that this rationale *requires a similar construction* of the more intrusive provision that directly regulates independent spending. We, therefore, hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.') (emphasis added).

2. The Express Advocacy Test is Not a Substantive Rule of Constitutional Law

As is clear from the discussion above, both *Buckley* and *MCFL* explicitly invoked the express advocacy test *only* as a means of statutory construction. In *Buckley*, the Supreme Court was confronted with two different provisions of FECA that both presented vagueness challenges for the Court. As a result, the Supreme Court turned to the ''cardinal principle' of statutory interpretation ... that when an Act of Congress

raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'' *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (observing the ''well-established principle that statutes will be interpreted to avoid constitutional difficulties'). I do not believe that in devising the express advocacy standard, the Supreme Court in *Buckley* was announcing an unalterable principle of constitutional law that would prohibit future congressional action directed toward express and issue advocacy. *See Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1085 (W.D. Wis. 2002) ('I am not convinced that *Buckley* was intended to work such a significant inhibition on future legislative efforts to address problems raised by the competing state interests and constitutional imperatives inevitably associated with express and issue advocacy.'); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1325 (S.D. Ala. 2002) ('The plaintiffs' second error is their insistence that *Buckley* held that all political speech other than express electoral advocacy lies beyond the reach of constitutional regulation, including disclosure requirements.'); *see also Va. Soc'y for HumanLife, Inc. v. FEC*, 263 F.3d 379,392 (4th Cir. 2001) ('[W]e are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.' If change is to come, it must come from an imaginative Congress or from further review by the Supreme Court.'). Rather, the *Buckley* Court was particularly concerned with construing vague provisions of a statute in order to avoid reaching difficult questions of constitutional law. In the case of section 608(e)(1), the Supreme Court was unsuccessful-even after construing the statute in an effort to avoid vagueness problems, the provision still failed to satisfy exacting First Amendment scrutiny. *Buckley*, 424 U.S. at 44-45. Whereas, in the case of section

434(e), the statutory construction successfully salvaged the statute which, as narrowed, bore 'a sufficient relationship to a substantial governmental interest.' *Id.* at 80.

The McConnell Plaintiffs argue that it is 'unfathomable' that Defendants would suggest the express advocacy test was not constitutionally ordained. McConnell Opp'n at 35-36 (quoting *Buckley*, 424 U.S. at 80) ('To insure the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section in the same way we construed the terms of § 608(e) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.') (emphasis removed). However, as the quoted language explicitly indicates, the Supreme Court *construed* the statutory language in an effort to save the provision from unconstitutional overbreadth. By adopting a narrowing construction to this vague provision, the Supreme Court easily found section 434(e) constitutional. *Buckley*, 424 U.S. at 80-82. Further diminishing the credibility of the McConnell Plaintiffs' argument is the fact that the *Buckley* phrase quoted by the McConnell Plaintiffs appears in the midst of a section the Supreme Court entitled 'Vagueness Problems.' *Id.* at 76.[112]

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[112] The McConnell Plaintiffs also offer the argument that because *Buckley* invoked First Amendment caselaw during its initial discussion of 'General Principles,' it was clear that *Buckley* was creating a rule of substantive constitutional law when it articulated the express advocacy standard. McConnell Opp'n at 37, McConnell Reply at 27 (citing *Buckley*, 424 U.S. at 14) (noting that *Buckley* cited *Mills v. Alabama*, 384 U.S. 214 (1966) and *New York Times v. Sullivan*, 376 U.S. 254 (1964)). However, Plaintiffs fail to point out that these citations appear in the section '*General Principles*'' and were cited for the uncontroversial proposition that the 'First Amendment affords the broadest protection to . . . political expression.' *Buckley*, 424 U.S. at 14 (emphasis added). It defies logic to argue that because the Supreme Court invoked First Amendment caselaw for the proposition that FECA's restrictions on contributions and expenditures operate in the area of the most fundamental First Amendment

Accordingly, Plaintiffs' reasoning is faulty when they argue that the 'express advocacy doctrine reflects more than a concern about vagueness.' ACLU Opp'n at 4; *accord* McConnell Opp'n at 37 ('[I]t is nonsensical to read the opinion as merely addressing statutory vagueness.'). In adopting the express advocacy doctrine, the Supreme Court was engaging in statutory construction in order to avoid unnecessarily declaring specific portions of FECA unconstitutional. In fact, nowhere in *Buckley* or *MCFL* does the Supreme Court explicitly state that the express advocacy test is a constitutional requirement. Each time the Supreme Court has invoked the express advocacy standard it has done so in the context of construing a vague portion of FECA. I would expect that if the Supreme Court were announcing a substantive rule of constitutional law it would have stated it explicitly in either of these two cases.

Plaintiff ACLU takes a snippet of the *Buckley* opinion, and without offering any textual analysis of the case, argues that *Buckley*'s clear ruling is that 'the government's regulation of expenditures can only reach 'communications that in express terms advocate the election or defeat of a clearly identified candidate. . . .'" ACLU Br. at 13 (quoting *Buckley*, 424 U.S. at 44). However, the Supreme Court stated in full: 'We agree that in order to preserve the provision against invalidation on *vagueness grounds*, § 608(e)(1) must be *construed* to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.' *Buckley*, 424 U.S. at 44 (emphasis added). When the quoted portion appears in its full context, it appears obvious the extent to which Plaintiff ACLU has misconstrued *Buckley*'s words. The express

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rights, that the Court was implicitly-thirty pages later-hewing express advocacy into constitutional stone.

advocacy test in *Buckley* was merely an appropriate exercise in statutory construction.[113]

Plaintiffs are correct that the *Buckley* Court 'did not posit a bipolar world of issue advocacy and express advocacy.' However, they err in concluding that the Supreme Court, therefore, 'permitted regulation only where it is unmistakably clear that the speech at issue can only be characterized as express advocacy.' McConnell Br. at 49; *see also* ACLU Br. at 15 ('Only 'express advocacy' can be subject to regulation; issue advocacy is free from permissible regulation.'). As Judge Richard W. Vollmer recently observed:

> The Supreme Court in *Buckley* employed no such terminology and recognized no such dichotomy. Rather, the *Buckley* Curt [sic] saw political speech as comprised of 'issue discussion' and 'advocacy of a political result.' 424 U.S. at 79. This would represent only a semantic difference if 'advocacy of a political result' were confined to express electoral advocacy, for then 'issue discussion' would occupy the same territory that the

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[113] Plaintiff ACLU also states that Title II of BCRA applies to advertisements 'that merely 'refer' to a candidate' and that, as a result, Title II 'should be struck down.' ACLU Br. at 13. The ACLU's argument lacks merit because the primary definition of BCRA does not place a 'ban on communications that merely 'refer' to a candidate.' ACLU Br. at 13. Rather, BCRA prohibits corporations and labor unions from funding *broadcast advertisements* with *general treasury funds*, which *refer to a federal candidate, run in close proximity to an election* and are *targeted to the candidate's relevant electorate*. Corporations and labor unions are, of course, free to fund as many of these prohibited advertisements as they desire from their separate segregated fund. I doubt anyone disputes the proposition that had Congress enacted a law that had banned communications that 'merely 'refer' to a candidate' that such a law would be declared overbroad and unconstitutional. *Id.* However, the restriction related to electioneering communications in BCRA is much narrower than Plaintiff ACLU describes in its briefing and is targeted to communications that influence federal elections.

plaintiffs claim for 'issue advocacy'—that is, all political speech that is not express electoral advocacy.

> The *Buckley* Court, however, recognized that advocacy of a political result extends beyond express electoral advocacy . . . . The *Buckley* Court introduced express electoral advocacy as a benchmark to provide speakers the clear boundary that the statutory cap on independent expenditures otherwise lacked. *Id.* at 43-44. *If express electoral advocacy were the only form of electoral advocacy that exists, the Court would not have been concerned that speakers could not tell the difference between issue discussion and electoral advocacy;* the Court established the express electoral advocacy standard precisely because other forms of electoral advocacy exist but may prove difficult to distinguish from issue discussion. . . .

Nat'l Fed'n of Republican Assemblies, 218 F. Supp. 2d at 1324 (emphasis added). Plaintiffs are mistaken in their conclusion that in not establishing a 'bipolar world,' the Supreme Court has necessarily decreed a rule of substantive constitutional law. As Judge Vollmer points out:

> Electoral advocacy is not automatically immune from regulation *but, to the extent it cannot easily be distinguished from issue discussion,* it may be necessary to exclude electoral advocacy from regulation so as to avoid self-censorship by uncertain speakers and the resulting abridgement of issue discussion. The bright line of express electoral advocacy was required under Section 434(e), not because all speech falling short of express electoral advocacy is immune from regulation, *but because no other means of readily distinguishing electoral advocacy from issue discussion presented itself.*

Id. at 1328-29 (emphasis added). The point of *Buckley* and *MCFL* was not that Congress can only regulate express

advocacy. Rather, the Supreme Court in these cases took a vague statute and construed it in such a manner so as to create a bright line because the statute itself did not provide any 'other means of readily distinguishing electoral advocacy from issue discussion.' *Id.* at 1329.

a. *Other Cases Cited by Plaintiffs Are Not Relevant or Are Distinguishable*

Plaintiffs' briefing, while heavy on hyperbole attacking Defendants' submissions, is incredibly light on textual analysis of the *Buckley* and *MCFL* opinions. Perhaps attempting to shift attention away from their lack of a robust discussion of *Buckley,* Plaintiffs attempt to bolster their position by citing to a series of lower court cases that Plaintiffs claim uphold the express advocacy standard as a rule of constitutional law. McConnell Br. 51-53. I acknowledge that there is some dicta in these cases which suggests that the express advocacy test is a constitutional requirement. Nevertheless, the language in these cases is dicta, is not binding precedent, and for the reasons discussed in this section, is unpersuasive.

The cases cited by Plaintiffs fall mainly into two categories. First, many of their cited cases involve courts striking down FEC regulations attempting to broaden the Supreme Court's express advocacy standard. Not surprisingly, courts rejected the FEC's efforts because neither they nor the Commission has the authority to redefine the statutory test. These courts correctly observed that Congress or the Supreme Court were the appropriate branches to undertake such steps. BCRA is therefore consistent with this strand of caselaw. The second grouping of cases involve federal courts striking down state statutes and state regulations that had a variety of constitutional defects. In these cases, the state statutes at issue all captured too much pure issue advocacy without fashioning an appropriate test that predominantly regulated electoral advocacy. BCRA

differs from these state provisions in that with BCRA, Congress, supported by a plethora of evidence and experience, created a narrowly tailored definition of electioneering communication that is specifically focused on communications that influence federal elections.

With regard to the cases where courts struck down FEC regulations, the Commission, and not Congress, had sought to define express advocacy broader than the Supreme Court had permitted in *Buckley*. *See, e.g., Va. Soc'y for Human Life*, 263 F.3d at 385, 392 (striking down FEC regulation 11 C.F.R. § 100.22(b) that defined express advocacy in such a manner so as to include communications that 'could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates'); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (summarily affirming district court decision to strike down same regulation); *Right to Life of Dutchess Cty., Inc. v. FEC*, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998) (striking down same regulation). In relation to this broadly defined FEC regulation, these courts held that neither they nor the FEC had the authority to change the express advocacy test, concluding that to do so required further congressional or Supreme Court action. In fact only one decision concluded that the FEC could make such a regulation, *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), a case that has been largely discredited. *See, e.g., Chamber of Commerce of the United States of America v. Moore*, 288 F.2d 187, 194 (5th Cir. 2002) (citing cases disagreeing with *Furgatch*). In attempting to create these regulations, the FEC's efforts produced provisions plagued with vague terms that raised the same concerns that troubled the *Buckley* Court, placing the speaker at the mercy of the subjective intent of the listener to determine if a communication was covered by FECA. *See Buckley*, 424 U.S. at 43 ("In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these

circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.") (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Indeed, the consensus among the judiciary has been that courts 'are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy.' If change is to come, *it must come from an imaginative Congress or from further review by the Supreme Court.*" *Va. Soc'y for Human Life*, 263 F.3d at 392 (emphasis added).[114] Unlike the present case, the absence of further congressional action led these courts to strike down the FEC's regulation.

With regard to the second category of cases involving state law provisions, Plaintiffs refer to these decisions solely in a footnote. McConnell Br. at 53 n.20. These cited cases are each distinguishable because the state laws and regulations considered by the various courts each disregarded the principles of vagueness and overbreadth articulated in *Buckley* or reached too far in regulating issue advocacy. In *Chamber of Commerce*, the Fifth Circuit pointed out that the state statute at issue 'essentially adopted the language of the Supreme Court's decisions in *Buckley* and *MCFL* [which meant that the only decision that the court needed to reach was] to determine whether the Chamber's advertisements constitute 'express advocacy' under the standard articulated [in the state statute].' *Chamber of Commerce*, 288 F.3d at 196. Accordingly, for the court in *Chamber of Commerce*, the only decision to reach was whether the communications at issue in the case constituted express advocacy. There is some unexplained dicta in the case which states that the 'Supreme Court has held that the First Amendment permits regulation of political advertisements, but only if they *expressly*

[114] Other cases relied on by Plaintiffs concern other FEC regulations relating to voter guides. *Clifton v. FEC*, 114 F.3d 1309, 1317 (1st Cir. 1997); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991).

advocate the election or defeat of a specific candidate.' *Id.* at 190 (no citation provided). For the reasons articulated in this section, I expressly disagree with such dicta, presented without a thoroughgoing analysis of *Buckley* or any other support. *See Nat'l Fed'n of Republican Assemblies*, 218 F. Supp. 2d at 1329-30 (citing *Chamber of Commerce*) ('While some of these cases contain unexplained dicta arguably suggesting that express electoral advocacy is a universal, constitutional limitation on disclosure requirements, none so holds and none offers any textual analysis of *Buckley* that could support such a proposition.').

In another case cited by Plaintiffs, *North Carolina Right to Life, Inc. v. Bartlett*, the Fourth Circuit invalidated a North Carolina statute requiring political committees to make certain disclosures. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712-713 (4th Cir. 1999). The *Bartlett* court found 'unconstitutionally vague and overbroad' a state statute that reached further than FECA in extending disclosure requirements to (1) groups that only incidentally engage in express advocacy and (2) groups engaging in issue advocacy. *Id.* In the same breath as it struck down the provision, the Fourth Circuit made clear that it would have first endeavored to save the provision like the Supreme Court did in *Buckley*. *Id.* at 712 ('The question then is whether we may similarly construe North Carolina's definition of political committee to save it from being void for vagueness.'). The court in *Bartlett*, therefore, only found that the North Carolina statute was not subject to a narrowing interpretation, not that the express advocacy test was a permanent fixture of constitutional law. However, to the extent some language in *Bartlett* could arguably lead in that

direction, I find it to be dicta unaccompanied by a serious textual analysis of *Buckley*.[115]

Plaintiffs also cite *Citizens for Responsible Government State Political Action Committee v. Davidson*, a case where the Tenth Circuit severed unconstitutional portions of a Colorado campaign finance law. The state law defined independent expenditure to include not only express advocacy, but also 'expenditures for political messages which unambiguously refer to any specific public office or candidate for such office.' *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187-88 (10th Cir. 2000). The term 'political message' was in turn defined as including messages delivered by telephone, by print or electronic media, or by any other written material that applied not only to express advocacy, but also to unambiguous references to candidates. *Id.* at 1188. The *Davidson* court found that as applied to the plaintiffs, the law encroached on legitimate issue advocacy, which 'is a violation of the rule enunciated in *Buckley* and its progeny.' *Id.* at 1194 (quoting *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000)). From the plain text of the Colorado statutes, the laws were aimed not just at electioneering, but also at pure issue discussion. No effort was made to draw a

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[115] Indeed in distinguishing *Bartlett*, the court in *National Federation of Republican Assemblies* found:

> Only a single case cited by the plaintiffs clearly stands for the proposition asserted. In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), the Court stated that Buckley 'defined political committee as including only those entities that have as a *major purpose* engaging in *express advocacy* in support of a candidate.' *Id.* at 712 (emphasis in original). The Court offered no authority for this proposition, which is plainly contrary to *Buckley* and which is dicta in any event.

Nat'l Fed'n of Republican Assemblies, 218 F. Supp. 2d at 1330 (footnotes omitted).

different line than had been drawn in *Buckley*, and as a result, the Tenth Circuit severed those constitutionally offensive portions. *Davidson* also contains unexplained dicta that 'the [Supreme Court in *MCFL*] clarified that express words of advocacy were not simply a helpful way to identify 'express advocacy,' but that the inclusion of such words was constitutionally required.' *Id.* at 1187. For the reasons set forth above, I disagree with this statement, and consider it to constitute unpersuasive dicta.

The other cases Plaintiffs cite are equally unpersuasive. *See Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 968-970 (8th Cir. 1999) (striking down a state regulation defining express advocacy in a similar manner as 11 C.F.R. § 100.22(b) as unconstitutional because the focus of the regulation is on 'what reasonable people or reasonable minds would understand by the communication'); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 1999 U.S. App. LEXIS 23325 at *5-*6 (7th Cir. 1999) (upholding Indiana disclosure statute after Indiana Supreme Court certified that statute applied only to organizations engaging in express advocacy). Indeed, the court in *Iowa Right to Life* grounded its decision on the fact that the 'State's definition of express advocacy creates uncertainty and potentially chills discussion of public issues.' *Iowa Right to Life*, 187 F.3d at 970.

After reviewing these cases, I am convinced that none of the cases cited above offer a convincing argument that express advocacy is a constitutional requirement. The vague and subjective terms associated with the provisions of FECA impelled the *Buckley* court to offer the express advocacy construction. In turning to BCRA, it is clear that the primary definition of electioneering communication does not present this problem.

3. The Primary Definition of Electioneering Communication is Not Vague

Unlike the vagueness concerns which motivated the Supreme Court in *Buckley* and *MCFL*, the primary definition of electioneering communication is not vague. Indeed, *none* of the Plaintiffs argued in their briefing or at oral argument that the primary definition presented any vagueness concerns. *See* McConnell Br. at 57-69; Tr. at 264-65 (Waxman) ('No one is arguing—I don't believethat any of the 82 plaintiffs in this case argue that the principal definition that is the four-part test, is vague in any respect. It's hard to imagine how it could be less vague.') (none of the Plaintiffs ever objected to this characterization). In other words, there is no vagueness challenge to the primary definition presently before the Court.

Plaintiffs make a number of general arguments in opposition to the primary definition: first, they contend that the primary definition fails because it regulates more speech than express advocacy, McConnell Br. at 44-57; second, they argue that even if express advocacy is not a constitutional requirement, the primary definition is unconstitutionally overbroad, McConnell Br. at 57-69; third, they argue that the primary definition of electioneering communications is 'woefully' underinclusive, McConnell Br. at 75-77; and fourth, they argue that the primary definition violates the Fifth Amendment, McConnell Br. at 77-81. *Nowhere*, however, do any of the Plaintiffs argue that the primary definition is vague. Given that among all of the seasoned political actors and organizations that comprise the remaining 77 Plaintiffs in this case, not one has argued that vagueness is a problem plaguing the primary definition, I could decline to engage in a vagueness inquiry. *See, e.g., Tri-State Hosp. Supply Corp. v. United States*, 142 F. Supp. 2d 93, 101 n.6 (D.D.C. 2001) ('The court makes no ruling on such acts, however, because the United States has not briefed the issue.'); *Carter v. Cleland*, 472 F. Supp. 985, 989 n.4 (D.D.C.

1979) ('This issue was not briefed by the parties. No decision will be rendered on it.'); *cf. Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993) ('[T]his Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously.'); *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001) (issues that are not briefed are considered 'abandoned') (*citing Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1264 (1997)).

However, since Judge Henderson discusses the vagueness question in her opinion, *see* Henderson Op. at Part IV.A, I note that even were I to entertain the vagueness question, I would conclude that the primary definition of electioneering communication is free from any vagueness infirmities. The primary definition of electioneering communication, as set forth in section 201 of the Act, comprises four distinct elements, each designed to be clear, objective, limited in scope, and directly responsive to the evidence concerning recent electioneering by corporations and labor unions with their general treasury funds. An advertisement falls within the definition, and therefore would have to be funded with money from a labor union or corporation's segregated fund, if, *and only if*, it satisfies *each* of the following four elements:

> A. It is broadcast by television, radio, cable, or satellite. Newspaper advertisements, direct mail, billboards, phone banks, Internet advertisements, door-to-door canvassing, or leaflets are not covered by the primary definition.
>
> B. It refers to a 'clearly identified candidate' for federal office. Broadcast advertisements dealing with issues are not electioneering communications, unless the advertiser chooses to mention or show a particular federal candidate.[116]
>
> C. It runs in the 60 days before a general election, or the 30 days before a primary.
>
> D. The advertisement is *targeted* to the identified candidate's electorate. Specifically, the advertisement must reach at least 50,000 voters in a relevant state or district.

BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A); *see also* Def.- Int. Br. at110. In a case construing a new Wisconsin statutory provision very similar to the primary definition of 'electioneering communication,' Chief Judge Barbara B. Crabb makes the compelling point that the Wisconsin statute at issue in that case actually posed less of a vagueness problem than the express advocacy standard identified in *Buckley:*

> Whatever the potential constitutional flaws of Wisconsin's new reporting and disclosure scheme, vagueness does not appear to be one of them. In fact, the state legislature's approach appears to draw a line even brighter than the one established in *Buckley*. The law makes clear that once a certain dollar threshold is

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[116] The language in the statute, 'refers to a clearly identified candidate for Federal office,' BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A), does not suffer the same problems that the *Buckley* court had with FECA's 'relative to' language. Although, the definition of 'refer' shares 'relate' as a synonym, 'refer' is a much moreprecise word. Merriam- Webster's Collegiate Dictionary, Tenth Edition 1997 (defining refer as '1 a: to have relation or connection: RELATE b: to direct attention usu. *by clear and specific mention.*'') (emphasis added). Given that 'refers to' is a much more exacting word than 'relative to,' and given that none of the Plaintiffs have complained that there is any ambiguity with this wording, I find that this phrase does not suffer from the same vagueness problems that plagued FECA when the *Buckley* court construed the phrase 'relative to.'

surpassed, the law's disclosure requirements apply to any communication referring to a clearly identified candidate that appears within 60 days of an election. *A copy of a proposed advertisement and a calendar are all that is necessary to make a conclusive advance determination that the ad is subject to regulation.* By contrast, the *Buckley* approach to express advocacy still leaves room for a degree of uncertainty because, as plaintiffs concede, the list of words and phrases identified in that opinion as constituting express advocacy is illustrative, rather [than] exhaustive. Therefore, in a later case involving the federal statute at issue in *Buckley,* the Court noted that the definition of express advocacy it adopted in *Buckley* would also cover a communication whose message 'is marginally less direct than 'Vote for Smith.'' *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 249 (1986). Just how 'direct' an exhortation must be to qualify as express advocacy under *Buckley* is not free of all uncertainty for would-be political advertisers.

Wisconsin Realtors, 233 F. Supp. 2d at 1086 (emphasis added). The same could be said of the primary definition of electioneering communication in BCRA. Electioneering communication is more certain and more explicitly defined than *Buckley*'s and *MCFL*'s explanation of express advocacy in that it provides objective criteria for potential political communicators to follow. Although there is no exhaustive list of words falling under the rubric of express advocacy, the electioneering communication definition is precise as to what communications are encompassed by its terms. Accordingly, I find none of the vagueness concerns identified by the *Buckley* Court present with regard to the primary definition of electioneering communication.

D. *The Evisceration of Section 441b*

1. Introduction

As discussed in the foregoing section, the Supreme Court in *Buckley* and *MCFL* construed FECA's restrictions on independent expenditures to apply only to expenditures containing words of 'express advocacy.' While the Supreme Court was prescient in observing that such a construction with regard to limits on an *individual's* independent expenditures was bound to create loopholes in the regulatory system, *Buckley,* 424 U.S. at 45 ('It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign.'), the Supreme Court emphasized in *Buckley* that it was without a record to uphold restrictions that went beyond express advocacy, *id.* at 46 ('[T]he provision does not *presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.') (emphasis added). In keeping with our system of constitutional checks and balances, the Supreme Court effectively sent the issue back to the political branches for further consideration. The Supreme Court, in my view, never conclusively foreclosed reconsideration of a limitation on independent expenditures, provided that such a restriction was not vague and was supported by an adequate record. Indeed, in the context of restricting corporate and labor union independent expenditures, the Supreme Court, after *Buckley,* explicitly left this door open. *See First Nat'l. Bank of Boston v. Bellotti,* 435 U.S. 765, 788 n.26 (1978) ('Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.').

The instant case presents such a record to the three-judge District Court and also demonstrates the wisdom of then-Justice Rehnquist's observation that the 'carefullegislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.' *NRWC*, 459 U.S. at 209 (internal citation and quotation marks omitted). Since 1996, corporations and labor unions have used their general treasury funds to influence federal elections in direct contravention of the original intent of Section 441b and its statutory predecessors. Congress responded to this problem by enacting Sections 201, 203, and 204 of BCRA. Therefore, before turning to a discussion of whether these sections of BCRA are narrowly tailored, I shall briefly discuss the erosion of the express advocacy test as a means of distinguishing between electoral advocacy and issue discussion. The Findings of Fact demonstrate that Congress correctly observed that Section 441b was no longer effective at preventing corporations and labor unions from using their general treasury funds to influence federal elections. Indeed, to quote a former NRA official, the state of the Section 441b prohibition prior to BCRA was 'built of the same sturdy material as the emperor's clothing.' Findings ¶ 2.4.3 (Metaksa).

The Findings of Fact with regard to the evisceration of Section 441b resemble a mosaic with each piece of evidence building on the next, and when viewed as a whole, present a damaging portrait of corporations and labor unions using their general treasury funds to directly influence federal elections. It is to this picture that I now turn.

2. The Rise of Spending on Issue Advocacy in Close Proximity to Federal Elections

As discussed *supra*, in *MCFL*, the Supreme Court construed the prohibition on expenditures in section 441b as only applying to expenditures containing words of 'express

advocacy.' *MCFL*, 479 U.S. at 249 ('We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.'). As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of 'express advocacy.' In other words, so long as corporations and labor unions did not use any of *Buckley*'s 'magic words' in their advertisement, they could use their general treasury funds to pay for advertisements that influenced a federal election. Of course, if the corporation or labor union chose to use the magic words in an advertisement, it could still do so, provided it paid for such a communication from a segregated fund, thereby ensuring that there was political support for the advertisement.

As a consequence of the Supreme Court's decision in *MCFL*, candidate-centered issue advertisements,[117] funded with corporate and labor union general treasury funds, has dramatically increased in recent election cycles. Findings ¶ 2.2. 'By the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits.' *Id.* ¶ 2.2.7 (Magleby).[118] The 2001 Annenberg

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[117] As the Findings demonstrate, issue advertisements generally fall into three categories: candidate-centered, legislation-centered, and general image-centered. Findings ¶ 2.2.2. Candidate-centered advertisements make a case for or against a candidate but do so without using 'magic words.' *Id.* These are the advertisements that BCRA seeks to distinguish from other forms of issue advocacy.

[118] The reason why it was not until 1996 that this explosion in candidate-centered issue advocacy occurred, as political consultant Bailey explains, was that in post-Watergate campaigns, it was important for candidates to be seen as attempting to clean up the political process.

Report, relied on by Defendants, Plaintiffs, and Congress, establishes that during the 1996 election cycle, an estimated $135 million to $150 million was spent on multiple broadcasts of about 100 distinct advertisements, in the 1997-1998 election cycle, 77 organizations aired 423 distinct advertisements at a cost of between $250 million and $340 million,[119] and in the 1999-2000 election cycle, 130 groups spent over an estimated $500 million on 1,100 distinct advertisements. *Id.* ¶ 2.2.4.[120] Plaintiffs' own expert readily concedes that the number of organizations sponsoring issue advertisements has "exploded" over the last three election cycles. *Id.* ¶ 2.2.6 (La Raja).[121] From their studies, the

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Findings ¶ 2.2.7 (observing that 'due to a lack of enforcement and a willingness on the part of some to win at s advocacy into constitutional stone.

[119] The report the Annenberg Study produced following the 1997- 1998 election cycle placed this estimate at between $275 million to $340 million. *See supra* note 78.

[120] As a representative sample, the Annenberg Report 2001 found that in the 2000 election cycle, the Republican and Democratic parties accounted for almost $162 million (31%) of this spending on issue advocacy, Citizens for Better Medicare, $65 million (13%), Coalition to Protect America's Health Care, $30 million (6%), U.S. Chamber of Commerce, $25.5 million (5%), AFL-CIO, $21.1 million (4%), National Rifle Association, $20 million (4%), U.S. Term Limits, $20 million (4%). Findings ¶ 2.2.4.

[121] Interestingly, the huge rise in issue advocacy spending during federal campaigns far outpaces spending on the amount of PAC-sponsored advertising. Under the original intent of FECA, corporations and labor unions that wished to sponsor electioneering advertisements would have had to do so with segregated funds (e.g. "PAC money"). 2 U.S.C. § 441b(b)(2)(C). During the 2000 election cycle, non-PAC interest groups ran 74,024 political advertisements referring to a federal candidate, while PAC interest groups ran only 3,663 advertisements. Findings ¶ 2.2.5.2. Although none of the parties discuss this discrepancy, and although there are likely a number of factors to explain it, it does not take much imagination to conclude that one of the primary reasons that PAC advertising is so low in comparison, is that if a corporation or labor union can fund the most effective form of electioneering with general treasury funds, there is no need to try and raise PAC money or comply with PACs' disclosure provisions simply to run electioneering advertisements that use words of "express advocacy."

Annenberg Public Policy Center concludes that the amount of money spent on "issue advocacy" is increasing rapidly, that this development permits the political parties, corporations, and labor unions to gain a "louder" voice, and that consequently, the "distinction between issue advocacy and express advocacy is a fiction." *Id.* Indeed, even the political parties recognize the value which these outside corporations and labor unions bring to the election with their issue advocacy. *Id.* ¶ 2.7.10.

3. "Magic Words" Are Rarely Used in Political Advertisements

As issue advocacy by corporations and labor unions has grown as a means of influencing federal elections, the trend of all forms of political advertisements has been to move away from words of express advocacy-whether they are advertisements produced by candidates, political parties, or corporations and labor unions. Findings ¶ 2.3. The unrebutted expert testimony demonstrates that only 11.4 percent of advertisements purchased by federal candidates that aired during the 2000 election cycle would qualify as electioneering under the "magic words" test. *Id.* ¶ 2.3.1 (Goldstein); *see also id.* ¶ 2.3.2 (Strother) (observing that 90% of candidate advertisements he has put together in his career have *not* used express advocacy). Moreover, the uncontroverted testimony of political consultants establishes that express advocacy is no longer considered an effective tool of political advertising. *Id.* (Strother) ("Good media consultants never tell people to vote for Senator X; rather, you make your case and let the voters come to their own conclusions. In my experience, it actually proves less

effective to instruct viewers what you want them to do."); (Bailey) ("In the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.'"). When *Buckley* was handed down, express advocacy in political advertising was more common. *Id.* (Bailey). Since the mid-1980s, political advertising has shifted and today the practices of political advertisers-with only a mere 30 seconds to convey their messages-parallel commercial advertisers where a "product is presented in various desirable tableaus ... present[ing] viewers with a variety of reasons to choose their product." *Id.* ¶ 2.3.3 (Krasno and Sorauf) ("Political ads seem to follow the same strategy, hoping that citizens will grow to prefer a candidate without being told to troop to the polls.").

4. Other Advantages of Using Issue Advocacy to Influence Federal Elections

Aside from the fact that candidate-centered issue advocacy is a much more powerful means to convey an electioneering message, it is uncontroverted there are other strong incentives for using "issue advocacy" to influence federal elections. *Id.* ¶ 2.5. First, by running "issue advertisements" in the immediate run-up to a federal election, corporations and unions are able to avoid any of the disclosure requirements that ordinarily attach when these groups use general treasury funds to influence federal elections. *Id.; id.* ¶ 2.5.1. Plaintiffs' Experts Milkis and La Raja equally concur that the rise of issue advocacy has permitted issue organizations to hide their true identities while running these advertisements. *Id.* ¶ 2.5.1 (Milkis); ¶ 2.2.6 (La Raja) ("Over the last three election cycles, the number of groups sponsoring ads has exploded, and consumers often don't know who these groups are, who funds them, and whom they represent."). As Plaintiffs' expert Milkis candidly observes, "For example, The Citizens for Better Medicare, which spent $65 million on television ads [during the 2000 election cycle], is funded primarily by the

pharmaceutical industry." *Id.* ¶ 2.5.1; *see also id.* (citing example of AFL-CIO running advertisements in congressional race under the name "Coalition to Make Our Voices Heard"); *id.* ("Frankly we've taken a page out of their book [other interest groups] because in some places it's much more effective to run an ad by the 'Coalition to Make Our Voices Heard' than it is to say paid for by 'the men and women of the AFL-CIO.'") (Magleby) (citing comments of AFL-CIO representative at a lunchtime discussion panel at the Pew Press Conference). As a result, not only are corporations and unions able to fund the most effective form of political advertising with their general treasury funds, but they are able to create corporations which have euphemistic names and which, in many instances, serve as fronts for injecting corporate general treasury funds into federal elections. *Id.* In addition to avoiding FECA's disclosure requirements, it is uncontroverted that another advantage of running election advertisements as "issue advocacy" is that corporations and labor unions can use their general treasury funds to influence federal elections which, as Defense Expert Magleby observes, "makes a sham of these longstanding federal laws." *Id.* ¶ 2.5.2. The uncontroverted testimony of Defense Expert Magleby also makes clear that by avoiding PACs, these organizations can raise larger amounts of funds more quickly than if they had to raise money to pay for their advertisements using PACs. *Id.* ¶ 2.5.3.

5. The Impact of These Developments

Accordingly, when the Supreme Court's construction of Section 441b in *MCFL* is combined with the fact that very few political advertisements use words of express advocacy, the result is obvious: corporations and labor unions, long prohibited from using their general treasury funds to influence federal elections, are able to run the most effective form of political advertising and the most widely used form of political advertising from their general coffers. At the same

time, the law constitutionally prohibits corporations and labor unions from using general treasury funds to influence federal elections with advertisements that use express words of advocacy-a style of advertising rarely used and described by political consultants as ineffective. The unintended result of this development is that the longstanding prohibition on the use of corporate and labor union general treasuries to influence federal elections is undermined. Indeed, the role of corporations and labor unions in federal elections is actually enhanced because these corporations and labor unions are able to fund the most potent form of political advertising using treasury funds.

The testimony from political consultants, experts, and officeholders and candidates convincingly bears this point out. The record demonstrates that the express advocacy test is not a useful benchmark for distinguishing between campaign advertising and issue advertising, that no particular words are necessary to create electioneering advertisements, and that corporations and labor unions produce advertisements that directly influence federal elections under the guise of "issue advocacy." *Id.* ¶ 2.4. Despite the fact that *MCFL* interpreted Section 441b as reaching more advocacy than the examples in *Buckley's* footnote 52, *MCFL*, 479 U.S. at 249, the test has proven ineffective at distinguishing between genuine issue advocacy and electioneering paid for with corporate and labor union general treasury funds. Indeed, as the testimony presented in this case convincingly demonstrates, no particular words of advocacy are necessary for effective campaign advertisements; it is easier for corporations and labor unions to skirt the prohibition contained in Section 441b. In sum, Congress found that the express advocacy test, grafted onto Section 441b by the *MCFL* Court, was no longer preventing corporations and labor unions from spending general treasury funds on federal elections. Findings ¶ 2.4.4.

6. Corporations and Labor Unions Routinely Spend General Treasury Funds on Advertisements Designed to Influence Federal Elections

a. *Political Consultants Testify that Candidate-Centered Issue Advertisements are Electioneering*

Advertisements designed to influence a federal election under the guise of issue advocacy usually end by telling the viewer to call, ask, or tell a candidate to do something. Findings ¶ 2.4.3 (Pennington). From the perspective of political consultants, who provide testimony in this case, there is no practical difference between these "issue advertisements" and those advertisements where express advocacy is used. *Id.* (Strother) ("From the point of view of a media consultant, there is no real difference between ending an advertisement with 'Vote for Senator X' versus ending an advertisement with 'Tell Senator X to continue working hard for America's families.'"); (Beckett) ("However, in fact no particular words of advocacy are needed in order for an ad to influence the outcome of an election. No list of such words could be complete . . . ."); (Lamson) ("When political parties and interest groups run 'issue ads' just before an election that say 'call' a candidate and tell her to do something, their real purpose is typically not to enlighten the voters about some issue, but to influence the result of the election, and these ads often do have that effect."). Plaintiffs have provided no contrary political consultant testimony to discredit the testimony of these political consultants. I find the uncontroverted testimony of the political consultants particularly compelling because it comes from well-known and respected professionals who are engaged in the business of making political advertisements. *See id.*

Ms. Tanya Metaksa, former Chair of the NRA PVF, stated in her opening remarks at the American Association of Political Consultants' Fifth General Session on "Issue Advocacy" that "[i]t is foolish to believe there is any practical difference

between issue advocacy and advocacy of a political candidate. What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* (Metaksa); *see also id.* (Strother) ("When we design, produce, and run 'issue ads' that mention specific candidates for federal office and that are aired in proximity to an election, these ads are for only one purpose: to effect [sic] the outcome of an election."). In concrete terms, perhaps the most striking example of this "line in the sand drawn on a windy day," is the two camera shoot, where consultants bring two cameras to shoot an advertisement. *Id.* (Strother). The film in Camera A is used by the candidate, while the nearly identical film in Camera B is sold for a nominal fee to a third party who then "gets direct control over the images of the candidate used in the issue groups ads." *Id.* In my judgment, the testimony of political consultants provides overwhelming evidence that corporations and labor unions spend general treasury funds on advertisements that, while not using words of express advocacy, are designed to influence federal elections.

b. *Current and Former Officeholders and Candidates Testify that Corporations and Labor Unions Use General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

In addition to political consultants, current and former officeholders and candidates testify that the express advocacy test has become meaningless, that no particular words of advocacy are necessary to convey an electioneering message, and that corporations and labor unions were using their general treasury funds to influence federal elections. *Id.* ¶ 2.4.2. This testimony is particularly compelling given that the political actors supporting BCRA, to borrow words from Justice Byron White, "included many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part, dissenting in

part); *see also Colorado I*, 518 U.S. at 650 (Stevens, J., dissenting) ("Congress surely has both wisdom and experience in these matters that is far superior to ours."). Even Plaintiff Congressman Ron Paul conceded during his deposition that outside group issue advertisements run during his 2000 congressional campaign were intended to influence the election. Findings ¶ 2.4.2.1 (Paul). Politicians from both political parties provide convincing testimony in this case, and also provide important guidance through floor statements made during the debate over campaign finance legislation, that in their considered judgment the express advocacy test was not preventing corporations and labor unions from influencing federal elections using general treasury funds, and that no particular words are necessary to convey an electioneering message. *Id.* ¶ 2.4.2 (including statements and testimony from Feingold, McCain, Levin, Bloom, Bumpers, Chapin, and Shays).

c. *Examples of Corporations and Labor Unions Demonstrate That These Organizations Use Their General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

The record, however, goes beyond the testimony of experts, political consultants, and present and past officeholders and candidates. The documented behavior of corporations and labor unions also clearly demonstrates that issue advocacy is used as a tool of electioneering by corporations and labor unions. *Id.* ¶ 2.6. The Findings, which culled the most salient examples from the substantial record submitted by the parties, demonstrate that, for example, the AFL-CIO, the Coalition, Citizens for Better Medicare, the NRA, and The Club for Growth all used corporate general treasury funds to influence recent federal elections. *Id.* ¶ ¶ 2.6.1-2.6.5. Plaintiffs dismiss this evidence as merely "anecdotal," McConnell Opp'n at 32, which is a characterization of the weight of the evidence and not a

comment on whether it is rebutted. To the contrary, the examples of corporations and labor unions using general treasury funds to influence federal elections are not "anecdotal," but powerful illustrations of a regulatory regime in paralysis. Indeed, like a mosaic, these "anecdotal" examples when combined with the other evidence in the record relating to the general ineffectiveness of Section 441b, and the failure of the express advocacy test, make a compelling case for the restrictions Congress arrived at in enacting Sections 201, 203, and 204 of BCRA.

1) The NRA

The Findings relating to the activities of Plaintiff NRA, however, really drive home the point that the express advocacy test has become meaningless and that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections. *Id.* ¶ 2.6.4. Aside from the NRA's media consultant who stated that the first objective of the NRA was to influence the outcome of the presidential election and other key congressional races, *id.* at 2.6.4.1, the NRA ran two nearly identical radio advertisements in the 2000 election: one paid for with PAC money which used express advocacy and one paid for with corporate general treasury funds which did not use express advocacy. *Id.* ¶ 2.6.4.4. The only real difference between the advertisements was that the one paid for with PAC money said "Vote George W. Bush for President" at the end of the advertisement. *Id.* In my view, this advertisement is a perfect example-the poster child-of how pointless the express advocacy test is at distinguishing between genuine issue advocacy and electioneering advertisements. In addition to this evidence, the Findings, particularly those resting on the internal documents of the NRA, *id.* ¶ 2.6.4.1, also demonstrate just how driven the NRA was to use general treasury funds, which fell outside the source and amount

limitations of FECA, to directly influence the 2000 federal election. *Id.* ¶ 2.6.4.

2) Citizens for Better Medicare and The Club for Growth

Another glaring example from the Findings includes the pharmaceutical industry's uncontroverted efforts to influence the 2000 elections, *id.* ¶ 2.6.3, by admittedly spending over sixty-five million dollars on television advertising which, according to Plaintiffs' expert Dr. La Raja, was almost as much as either of the two political parties spent on issue advocacy, *Id.* ¶ 2.6.3.4. The pharmaceutical industry's efforts were cloaked behind the name "Citizens for Better Medicare." I have concluded from the testimony and documents submitted in this case that this issue advocacy campaign mounted during the 2000 election cycle was designed to influence the federal election with corporate general treasury funds in direct contravention of the historic prohibition on such activity. *See id.* ¶ 2.6.3; *see also id.* ¶ 2.6.3.4 ("Much of CBM's ad strategy leading up to the 2000 election was aimed at supporting candidates attacked in AFL-CIO advertising.").

In addition to CBM's activities, I have also found that Plaintiff The Club for Growth influenced the 2000 federal elections with corporate general treasury funds. *Id.* ¶ 2.6.5. The Club for Growth openly acknowledges in their solicitation materials that "these issue advocacy campaigns can make all the difference in tight races." *Id.* ¶ 2.6.5.4. Moreover, the activity of The Club for Growth in Florida in a 2000 Congressional race demonstrates in an uncontroverted manner the power of a corporation when it uses general treasury funds to influence federal primary elections. *Id.* ¶ 2.6.5.5.

3) AFL-CIO

With regard to the AFL-CIO's issue advocacy campaign during the 1996 federal election, I have found that the AFL-

CIO used issue advocacy to influence the 1996 general election. Findings ¶ 2.6.1. The internal documents surrounding the AFL-CIO's efforts are particularly revealing and directly contradict the AFL-CIO's self-serving declaration submitted in this case, which attempts to downplay the electoral considerations behind their advertisements. *Id.* ¶ 2.6.1.1 (observing that the indirect effect on election outcomes has "never been the point of [the AFL-CIO's broadcast advertising program"). The documents demonstrate that media consultants were hired by the AFL-CIO to test how their advertising would resonate with the electorate, how to create advertisements that "manage the political message in a volatile environment," and even how to place a media buy in Illinois to help a Senate candidate when the candidate did not have the resources to fund advertising on his own. *Id.* Moreover, other independent evidence, including expert testimony, establishes that the AFL-CIO's 1996 issue advocacy campaign was designed to influence the federal election. *Id.* ¶¶ 2.6.1.2-2.6.1.5. The AFL-CIO does not refute or explain the discrepancy between its general denial about its issue advocacy and these contrary evidentiary documents. The Findings elaborate on these points and others in more detail, but I conclude from this evidence that during the 1996 election campaign the AFL-CIO used general treasury funds to influence a federal election, and therefore was able to circumvent FECA's requirement that their efforts be paid for with federal funds from a segregated account. *See id.* ¶ 2.6.1.6 (observing that twelve of the thirty-two House Republican freshman targeted by the AFL-CIO were defeated).

4) The Coalition-Americans Working For Real Change

In response to the AFL-CIO, Plaintiffs Chamber of Commerce, National Association of Manufacturers, and National Association of Wholesaler-Distributors, and other business entities, formed a corporation entitled the

"Coalition-Americans Working for Real Change" also to influence directly the 1996 federal election. *Id.* ¶ 2.6.2. I have found that The Coalition's issue advocacy campaign around the 1996 election was designed to influence the federal election. *Id.* Like the AFL-CIO, the internal documents of the Coalition demonstrate that electoral strategies, and not "issue advocacy," were at the heart of the Coalition's efforts in 1996. *Id.* ¶ 2.6.2.2. Indeed, the Coalition sought advice from consultants and polling firms on how to maximize their ability to influence federal elections. *Id.* These internal documents, combined with independent expert testimony and the FEC General Counsel's report, *see id.* ¶ ¶ 2.6.2.3-2.6.2.4, strongly contradict the Coalition's self-serving efforts in this litigation to portray their 1996 advertising campaign as something less than electioneering advertisements in disguise. The Coalition used corporate general treasury funds to directly influence the 1996 election and, therefore, was able to circumvent FECA's policy of compelling corporations to use federal money from a segregated account. *See generally id.* ¶ 2.6.2; *see also id.* ¶ 2.6.2.2 (post-election analysis done by Coalition's polling firm).

The AFL-CIO and The Coalition presented no uncontroverted evidence that they did not try to influence the 1996 federal election with issue advertisements. Moreover, these organizations do not contest that they paid for these advertisements with general treasury funds. The effort by the AFL-CIO and The Coalition to portray themselves as engaging in issue advocacy, as opposed to electioneering, is belied by their own internal documents.

d. *Other Examples of Advertisements Demonstrate That Corporations and Labor Unions Use Their General Treasury Funds to Pay for Advertisements Designed to Influence Federal Elections*

Aside from the examples above of corporations and labor unions directly using general treasury funds to influence

federal elections, the attributes of so-called "issue advertisements" in the Findings demonstrate the electioneering purpose behind these commercials.

1) Organizations Run Issue Advertisements About Which They Have No Particular Organizational Interest

First, the Findings compellingly demonstrate that many candidate-centered issue advertisements are run about issues in which the organization sponsoring the advertisement has no interest. *Id.* ¶ 2.6.6. On this basis, it is clear that these advertisements were designed to influence a federal election. For example, EMILY's List, an organization dedicated to pro-choice female candidates, ran advertisements on gun-control for federal candidate Linda Chapin. *Id.* ¶ 2.6.6.1. Other examples from the Findings include the Associated Builders and Contractors running an advertisement about a federal candidate that dealt with penalties for child molesters. *Id.* ¶ 2.6.6.2 (admitting that such an advertisement is not of a particular concern of contractors). In another situation, the Club for Growth funneled $20,000 to the American Conservative Union to fund an issue advertisement relating to Hillary Clinton's candidacy which the Club candidly admitted at deposition had nothing to do with the Club's interest in pro-growth conservative Republicans. *Id.* ¶ 2.6.6.3. Another example is an advertisement run by the trucking industry, under the pseudonym "The Foundation for Responsible Government," praising the record of an opponent of a Senator on health care and taxes. *Id.* ¶ 2.6.6.4 (observing that the Senator was a target of the group because he supported legislation banning triple trailer trucks). Finally, the group Citizens for Life, a New Hampshire Pro-Life Organization, ran advertisements in 2000 against John McCain criticizing jokes allegedly made by McCain about Alzheimer's and a home for senior citizens. *Id.* ¶ 2.6.6.5. The New Hampshire group claimed the advertisement was timely because the *New Hampshire State* Senate was close to voting

on a bill to legalize assisted suicide. *Id.* I am not persuaded that any of these advertisements were anything other than electioneering advertisements. Rather, these examples demonstrate that corporations spend general treasury funds on candidate-centered issue advertisements to influence federal elections. *Id.* ¶ 2.6.6.6.

2) Organizations Run Issue Advertisements About Past Votes or About Issues No Longer Before Congress

Second, organizations run candidate-centered issue advertisements praising or criticizing candidates for past votes or discussing a Member's position on an issue not pending before Congress. These candidate-centered issue advertisements are clearly designed to influence federal elections. *Id.* ¶ 2.6.7. For example, the AFL-CIO has run a series of advertisements on past votes of particular Members of Congress. *Id.* ¶ 2.6.7.1. As discussed in my Findings, these advertisements are nothing more than campaign advertisements. *Id.* Another example of this practice is the Chamber's advertisements attacking various Members of Congress over the prescription drug issue that was not pending before Congress when the advertisements were aired. *Id.* ¶ 2.6.7.2. Many of these advertisements did not include a phone number to contact the Member, and some of the advertisements were aired against candidates who were not even Members of Congress. *Id.* The Chamber's advertising in this regard was plainly designed to influence the federal election. *Id.* These examples from the AFL-CIO and the Chamber also demonstrate that corporations and labor unions used general treasury funds to pay for candidate-centered issue advertisements designed to influence a federal election. *Id.* ¶ 2.6.7.3.

3) Organizations Air Advertisements When A Candidate Lacks Funds to Run Advertisements and So a Candidate Can Avoid Running Advertisements Attacking an Opponent

Corporations and labor unions also use general treasury funds to pay for candidate-centered issue advertisements (a) when candidates lack funds to put their own advertisements on the air and (b) to attack a candidate's opponent so that the candidate can run only "positive" advertisements. *Id.* ¶ 2.6.8. These indicators provide yet another powerful indication that these "issue advertisements" are nothing short of campaign advertisements designed to affect elections, paid for with the general treasury funds of corporations and labor unions. *Id.* ¶ 2.6.8.4. The uncontroverted testimony of political consultants is that negative character advertisements are often run by a third party because they shield the candidate from the political repercussions that are likely to result if the candidate actually ran the negative advertisement him or herself. *Id.* ¶ 2.6.8.1. In addition to allowing the candidate to refrain from running negative advertisements, organizations often run such advertisements praising a candidate or criticizing the candidate's opponent when the candidate's campaign does not have resources to run advertising on its own. *Id.* ¶ 2.6.8.2 (former Representative discussing how his opponent did not buy media in a media market that covered 40% of his district, but that other groups filled the void attacking the Representative); *id.* ¶ 2.6.8.3 (beneficial advertisements by EMILY's List ran when the Chapin campaign was not on the air to save resources); *id.* ¶ 2.6.1.1 (internal memorandum of the AFL-CIO discussing advertising buy by the union to help Illinois Senate candidate in markets where the candidate lacked resources to air advertising). I conclude that these advertisements were also clearly designed to influence a federal election and paid for with the general treasury funds of corporations and labor unions.

7. Conclusion

In sum, it again bears emphasizing that FECA has always permitted corporations and labor unions to run electioneering advertisements, provided that those advertisements were paid

for with money that came from a segregated fund dedicated specifically for federal electioneering. As the examples above illustrate, the utility of Section 441b as a tool to prevent corporate and labor union general treasury funds from influencing elections has been effectively blunted. *See id.* ¶ 2.6.9. While the primary purpose of these advertisements ultimately may be difficult to determine with precision, given the reticence of these organizations to admit they are campaign advertisements, the effect of these advertisements on federal elections is legion. Consequently, as I state in my Findings, "Congress found that FECA, as construed by the Courts, to only limit independent expenditures containing express advocacy, was no longer relevant to modern political advertisements." *Id.* ¶ 2.4.4; *see also id.* ¶ 2.4.3 (unrebutted testimony of political consultant Bailey) ("The notion that ads intended to influence an election can easily be separated from those that are not based upon the mere presence or absence of particular words or phrases such as 'vote for' is at best a historical anachronism."). Congress appropriately concluded that corporations and labor unions were openly violating the intent of its longstanding (and long-upheld) prohibition on the use of corporate and labor union general treasury funds to influence elections.

In crafting the primary definition of electioneering communication, Congress recognized just how difficult the task of discerning a speaker's true intent can be for a court or regulatory agency. Taking heed from *Buckley*'s stringent admonition that a distinction between the discussion of issues and advocacy for the election or defeat of candidates "may often dissolve in practical application" and that a law must be construed in a manner that avoids "'put [ting] the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers,'" *Buckley,* 424 U.S. at 42, 43, Congress crafted an objective, impartial, and thoroughly simple test for distinguishing between electioneering and issue advocacy. Congress recognized, as the record in this

case indicates, that candidate-centered issue advertisements influence federal elections. Congress thereafter drew an incredibly clear bright-line test that focuses on the key empirical determinants that distinguish pure issue advertisements from candidate-centered issue advertisements. The result is that broadcast advertisements paid for by corporations or labor unions, aired in close proximity to an election that clearly identify a federal candidate, and are targeted to that candidate's electorate, need to be paid for with federal funds from a segregated account. Congress, therefore, is not prohibiting speech by any corporation or labor union; it is merely requiring these organizations to pay for speech that ostensibly influences federal elections with segregated funds that are regulated under FECA.

The question remaining is whether this bright line that Congress has drawn is narrowly tailored to serve compelling governmental interests. I shall first turn to the compelling governmental interests behind Title II and then shall move to a discussion of whether Title II of BCRA is narrowly tailored to serve those compelling governmental interests.

E. *Title II of BCRA is Narrowly Tailored to Serve a Compelling Governmental Interest*

1. BCRA's Prohibition on Electioneering Communications; the Primary Definition Serves Compelling Governmental Interests

As discussed *supra,* Section 203 extends the longstanding prohibition on corporations and labor unions making contributions or expenditures from general treasuries in connection with federal elections to electioneering communications as defined in the primary definition. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. § 441b(b)(2). Corporations and labor unions are now prohibited from spending general treasury funds on electioneering communications, but are permitted to spend unlimited federal money from separate

segregated funds on electioneering communications. Even though a corporation or labor union "remains free to establish a separate segregated fund, composed of contributions earmarked for that purpose by the donors . . . the corporation [or labor union] is *not* free to use its general funds for campaign advocacy purposes [and w]hile that is not an absolute restriction on speech, it is a substantial one." *MCFL,* 479 U.S. at 253 (emphasis in original) (plurality opinion). As a result, even though the Act permits corporations and labor unions to make electioneering communications with their segregated funds, the prohibition in section 203 must be "justified by a compelling state interest." *Id.*

In discussing the compelling governmental interests in enacting sections 203 and 204, Defendants rely on long-standing precedent of the Supreme Court that has already extensively discussed the compelling interests related to government regulation of corporate and labor union general treasury funds in the context of federal elections. Gov't Br. at 133-134. The Supreme Court's prior discussions of the compelling interests needed to sustain restrictions on corporate and labor union general treasury funds are equally applicable in the context of Sections 203 and 204 of BCRA. Plaintiffs, with the exception of the NRA, do not seriously question this position, but rather focus their energies on the fact that these provisions are not narrowly tailored to serve these compelling governmental interests. As discussed *infra,* I find Plaintiffs' argumentation on that point to be rebutted by the extraordinary record in this case. Before turning to these arguments, however, I shall briefly discuss the compelling governmental interests behind sections 203 and 204 in Title II.

In defending the constitutionality of Title II, Defendants rely on the compelling governmental interest described in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and supported by a rich history of Supreme Court

cases discussing Section 441b.[122] Defendants also contend that the compelling governmental interest supporting the prohibition on electioneering communications relates to the potential for the appearance of corruption that occurs when corporations and labor unions pay for electioneering communications with their general treasury funds. Tr. at 252 (Waxman) ("[T]he record in this case of the kind of *Austin* corruption, and even potential *quid pro quo* corruption, absolutely dwarfs the evidentiary record that the Supreme Court has considered in any of the cases it has decided, including *Buckley*."). As a corollary to this latter theory, Defendants also advance an anti-circumvention rationale to justify these provisions, observing that "BCRA's regulation of electioneering communications furthers the compelling governmental interest in preventing corruption of elected officials, not only on its own terms, but also by helping to ensure that the new limits on soft money will not be easily evaded." Gov't Br. at 146. I conclude that the first two theories of corruption are sufficient to uphold the challenged provisions and therefore do not reach the third.

a. *Corruption Related to Corporations and Labor Unions*

The Supreme Court has long indicated that the government has a compelling interest in placing restrictions on corporate and labor union involvement in federal elections so as to prevent "the corrosive and distorting effects of immense aggregations of wealth," facilitated by either the corporate or union forms, on federal elections. *Austin*, 494 U.S. at 660. As discussed *supra*, corporations and labor unions routinely seek

[122] The parties to the litigation have dubbed this compelling governmental interest theory "*Austin* corruption." Even though the statute in *Austin* only applied to corporations, *Austin*, 494 U.S. at 655, the Supreme Court has long upheld a similar corruption rationale in the case of labor unions. *See Pipefitters*, 407 U.S. at 415-16, *UAW*, 352 U.S. at 585, *NRWC*, 459 U.S. at 207-08.

to influence federal elections with broadcast advertising campaigns, paid for with general treasury funds. Sections 203 and 204 of BCRA, which are plainly designed to combat this development, fulfill the same purposes that the government identified as supporting Section 441b in *NRWC* and that the Supreme Court upheld:

> The first purpose of § 441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions. *See United States v. United Automobile Workers*, 352 U.S. 567, 579 (1957). The second purpose of the provisions, the government argues, is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. *See United States v. CIO*, 335 U.S. 106, 113 (1948).
>
> We agree with the government that these purposes are sufficient to justify the regulation at issue.

NRWC, 459 U.S. at 207-08. In a nutshell, *NRWC* encapsulates the compelling governmental interests behind Section 441b, which also plainly serve as a basis for upholding BRCA Sections 203 and 204.

The Supreme Court's most recent discussion of these justifications was in *Austin*, where the Supreme Court considered a Michigan state statute which was patterned after section 441b, prohibiting corporations from making independent expenditures in connection with state candidate elections. *Austin*, 494 U.S. at 655 n.1. The issue before the Court was the constitutionality of the state's ban on independent expenditures made by corporations, which the Court held to be "constitutional because the provision is

narrowly tailored to serve a compelling state interest." *Id.* at 655. In finding the compelling interest justifying Michigan's statute, the Court recognized a "different type of corruption in the political arena" than the appearance of corruption that had been used to justify *Buckley*'s restrictions on individuals making independent expenditures. *Id.* at 660.

As a baseline, the *Austin* Court reiterated that "'[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'" *Id.* at 658 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*")) (alteration in original). The plaintiff in *Austin* had argued that because the restriction at issue focused on independent expenditures, as opposed to contributions, the danger of corruption or the appearance of corruption was not present. *See Buckley*, 424 U.S. at 47 ("Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counter-productive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.").

The *Austin* Court responded by distinguishing this language on the basis that it applied to independent expenditures made by *individuals* as opposed to those made by *corporations*. *Austin*, 494 U.S. at 659. Indeed, *Austin* pointed out that the Court had left open the possibility in *Bellotti*, that "a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by *corporations* to influence candidate elections." *Id.* (emphasis added) (citing *Bellotti*, 435 U.S. at 788 n.26) ("The importance of the governmental interest in preventing [corruption of elected representatives through the creation of

political debts] has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. *Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.*") (emphasis added).

Having set forth this analysis, the Supreme Court found that *regardless* of whether the danger of "financial *quid pro quo* corruption," *id.* at 659 (internal citations and quotation marks omitted), identified in *Buckley* as insufficient to uphold the limitation on independent expenditures made by individual donors, was present in the case of a corporation (a question clearly left open in *Bellotti*), the Court found that a "different type" of corruption rationale was sufficient to serve as Michigan's compelling interest. *Id.* at 659, 659-60. The *Austin* Court stated this rationale as "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. The Supreme Court was keen to point out that "the mere fact that corporations may accumulate large amounts of wealth is not the justification for [Michigan's restriction on independent expenditures]; rather, the unique state-conferred corporate structure that *facilitates* the amassing of large treasuries warrants the limit on independent expenditures." *Id.*

This "different" theory of corruption was not new as the *Austin* Court observed. *Id.* at 659 ("We therefore have recognized that 'the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.'") (quoting *FEC v. Nat'l. Conservative*

Political Action Committee, 470 U.S. 480, 500-01 (1985) ("*NCPAC*")) (also citing *MCFL*, 479 U.S. at 257). In fact, in *MCFL* the Court pointed out:

> We have described that rationale in recent opinions as the need to restrict "the influence of political war chests funneled through the corporate form," *NCPAC*, 470 U.S. at 501; to "eliminate the effect of aggregated wealth on federal elections," *Pipefitters*, 407 U.S. at 416; to curb the political influence of "those who exercise control over large aggregations of capital," [*UAW*], 352 U.S. at 585; and to regulate the "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization," *National Right to Work Committee*, 459 U.S. at 207. This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.

MCFL, 479 U.S. at 257.

Outside the context of corporations, the Supreme Court has been generally solicitous of a similar rationale for upholding Section 441b as applied to labor unions. In *Pipefitters* and *UAW*, as the *MCFL* Court observed, the Supreme Court found that the compelling governmental interest behind the regulation of corporations was applicable to labor unions. *Pipefitters*, 407 U.S. at 415-16 ("When Congress prohibited labor organizations from making contributions or expenditures in connection with federal elections, it was, of course, concerned not only to protect minority interests within the union but to eliminate the effect of aggregated wealth on federal elections."); *UAW*, 352 U.S. at 585 ("To deny that [using union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections] constituted an 'expenditure in connection with any [federal] election' is to deny the long series of congressional efforts calculated to avoid the deleterious influences on

federal elections resulting from the use of money by those who exercise control over large aggregations of capital."). As noted in *NRWC*, the government's interest in enacting such a provision relates to the fact that labor union members pay money into a union's general treasury and that money may be used to support candidates for office opposed by the individual union member, *NRWC*, 459 U.S. at 208, a justification that applies with equal force to corporate shareholders. *Id.* at 207.

Except for the NRA, none of the Plaintiffs who challenge Title II explicitly contest the asserted compelling governmental interests relating to preventing corruption or the appearance of corruption that emanates from the particular legal and economic attributes of corporations and labor unions. Given the longstanding history behind section 441b, this is not unexpected. Despite this fact, the NRA Plaintiffs spend significant time in their pleadings asserting that the compelling interest cannot support sections 203 and 204. NRA Br. at 9-14; NRA Opp'n at 6-17, NRA Reply at 12-14. As clarified by their reply brief, the NRA basically argues that this type of corruption only applies to those corporations that "use resources amassed in the economic marketplace, to obtain an unfair advantage in the political marketplace." NRA Reply at 12 (quoting *Austin*, 494 U.S. at 659 (in turn quoting *MCFL*, 479 U.S. at 257)). In *Austin*, the Michigan Chamber of Commerce, relying on *MCFL*, contended that the Michigan statute could not be applied to it because it was a "nonprofit ideological corporation." *Austin*, 494 U.S. at 661. The Supreme Court flatly rejected this *as-applied* challenge. *Id.* at 662-65. In this case, the NRA asserts a similar argument: that it is unlike the Michigan Chamber of Commerce in *Austin*, and therefore, broadly speaking, Title II cannot be justified as preventing *Austin* corruption. NRA Reply at 12 (stating that the NRA does not do business in the economic marketplace, nor derive market profits, nor derive more than a negligible portion of its revenues from corporate contributions).

Basically, however, the NRA is using *Austin* as a means of making an as-applied challenge to BCRA.

To begin with, in *MCFL*, the Supreme Court stressed that the rationale for regulating corporations and labor unions was "longstanding" and used to restrict "the corrosive influence of concentrated corporate wealth" on federal elections. *MCFL*, 479 U.S. at 257. The Supreme Court went on to explain that "[b]y requiring that corporate independent expenditures be financed through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace." *Id.* at 258. The resources available to the segregated fund, the Court reasoned, reflected "popular support for the political positions of the committee." *Id.* As a result, the Court observed that "[r]egulation of corporate political activity thus has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes." *Id.*

Nevertheless, the Supreme Court concluded that the government could not uphold Section 441b *as applied* to the plaintiff in *MCFL* based on this admittedly "longstanding" rationale. *Id.* ("Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise."). Therefore, the Supreme Court never questioned the government's asserted compelling interest in regulating corporations of all types—it merely held that *as applied* to MCFL, the rationale was insufficient to support Section 441b's restrictions.

The NRA would have us believe that this form of corruption is only available to uphold Section 441b

restrictions when the corporations being regulated are of the for-profit variety. NRA Reply at 12. In *Austin*, and for that matter in *MCFL*, the Supreme Court made *no* distinctions among different types of corporations when analyzing the compelling governmental interest. The *Austin* Court thus broadly recognized that all corporations benefit from the "state- conferred corporate structure that facilitates the amassing of large treasuries." *Austin*, 494 U.S. at 660; *see also MCFL*, 479 U.S. at 268 (Rehnquist, C.J., concurring in part, dissenting in part) ("I do not dispute that the threat from corporate political activity will vary depending on the particular characteristics of a given corporation; it is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations *or nonprofit corporations* . . . . These distinctions among corporations, however are distinctions in degree that do not amount to differences in kind.") (emphasis added) (internal citation and quotation marks omitted). The Court in *MCFL* merely held that *as applied* to the plaintiff in *MCFL*, Section 441b could not be upheld by the longstanding compelling governmental interest present in avoiding the corrosive effects of large treasuries of corporations accumulated with the assistance of the corporate form. In *Austin*, the Court held that the state statute could be applied to the plaintiff because the Michigan Chamber of Commerce did not qualify for an *MCFL* exemption.

The NRA never directly disputes this proposition; rather, the organization essentially contends that like the plaintiff in *MCFL*, and unlike the plaintiff in *Austin*, sections 203 and 204 of BCRA cannot be upheld when *applied* to the NRA because as an organization it does not use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace. NRA Br. at 12; *see also* NRA Reply Br. at 12. The NRA implicitly presents the Court with an as-applied challenge couched in *Austin*-terms instead of

those of *MCFL*. NRA Br. at 14 ("In any event, the NRA satisfies every criterion identified by the *Austin* Court for extending the First Amendment's protection to the independent political expenditures of a nonprofit political advocacy corporation . . . ."). Of course, in making its decision that the Michigan Chamber of Commerce did not qualify for an *MCFL* as-applied exemption, the *Austin* Court was explicitly relying on *MCFL*. *Austin*, 494 U.S. at 661-62.

On July 31, 2002, the NRA filed a joint motion to stay, *inter alia*, discovery in this case and agreed that they would also stay any as-applied challenge they had against BCRA under *MCFL* until the Supreme Court resolved the merits of Plaintiffs' challenge to BCRA. NRA Joint Mot. to Stay (Jul. 31, 2002) at 1-2. On August 13, 2002, the three-judge District Court entered an order granting this motion. *NRA v. FEC*, 02cv581 (D.D.C. Aug. 13, 2002) (order on joint motion to stay) ("ORDERED that there will be a stay of discovery and briefing of Plaintiffs' contention that BCRA's restrictions on 'electioneering communications' are unconstitutional as applied to them."). As is clear from their briefing on this point, with the *MCFL* avenue closed to them, Plaintiff NRA uses *Austin* to argue that BCRA, as applied to them, fails to satisfy any compelling governmental interest. NRA Reply at 12 (observing that Title II cannot be justified as designed to present *Austin*-type corruption because it does not amass resources in the economic marketplace.).

The NRA should not be able to litigate an as-applied challenge to Title II in direct violation of the three-judge panel's order, requested by the NRA, by merely cloaking such a challenge under *Austin* as opposed to *MCFL*. Defendants point out that they did not conduct discovery into the NRA's business practices on the basis of this order and therefore are in no position to discuss whether the NRA deserves an *MCFL*-type exemption. Gov't Opp'n at 107 n.109 ("Defendants have, thus, had no opportunity to

discover facts that might refute, *inter alia*, NRA's contention about its profits derived from business activities."); Def.-Int. Opp'n at 67 n.208 ("Indeed, the NRA specifically stipulated with defendants in this case that its as-applied challenge to coverage based on *MCFL* would be stayed pending the outcome of the general facial challenge. *See* Joint Motion to Stay (filed on July 26, 2002), at 2 (granted by the Court on Aug. 13, 2002).").

Any corporation that believes it deserves an *MCFL*-exemption may seek an exemption under the FEC's regulations-and any arguments relating to the strictness of those regulations-are open to a challenge *at that time*, by making that claim, or by resisting enforcement, just as the plaintiffs did in *Austin* and *MCFL*. Accordingly, the NRA's claim has no merit in this litigation, *NRA v. FEC*, 02cv581 (D.D.C. Aug. 13, 2002) (order on joint motion to stay),[123] and

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[123] In addition to the NRA, the ACLU also hints in its briefing that it fits within the class of corporations deserving of *MCFL*-type protection. *See* ACLU Br. at 16. I am extraordinarily skeptical that the NRA or the ACLU fit within the *MCFL* paradigm, which Justice Brennan, the author of *MCFL* described as a "small" class of exempt organizations. *Austin*, 494 U.S. at 672 (Brennan, J., concurring). First, each organization accepts corporate funding, ACLU Br. at 2 n.2, NRA Br. at 2. In *MCFL*, the corporation had an explicit policy against accepting corporate contributions. *MCFL*, 479 U.S. at 264. The NRA claims its corporate contributions are "negligible," NRA Br. at 2, while the ACLU argues that their corporate donations are "extremely modest," ACLU Br. at 17. These statements, themselves, indicate that both organizations would be minimally burdened if they were to forgo corporate funding so as to qualify for *MCFL* status. Nevertheless, the *absolute* amounts involved-$85,000 for the ACLU, ACLU Br. at 2 n.2, and $385,000 for the NRA, NRA Br. at 2-are not petty cash, particularly compared with what our Circuit has found to be *de minimis*.

The D.C. Circuit has held, in a case involving the NRA itself, that an organization may qualify for an *MCFL* exemption as long as it is not "a potential conduit for corporate funding of political activity." *FEC v. NRA*, 254 F.3d 173, 192 (D.C.Cir.2001). In *NRA*, the court stated that the

I conclude that the longstanding compelling governmental interests behind Section 441b are equally applicable to Sections 203 and 204 of BCRA.

b. *Appearance of Corruption*

Moreover, I find that congressional action in this case could be justified under the rationale that electioneering communications made with general treasury funds of corporations and labor unions create an appearance of corruption. The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.

In my judgment, the record in this case with regard to interest group issue advocacy substantially demonstrates the

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appropriate test for this inquiry is whether "[t]he harm contemplated by the statute stems from the absolute amount of corporate money an organization has to spend in the political process, not from the relationship between corporate contributions and the organization's total revenues." *Id.* (finding that $7,000 in corporate contributions in one year precluded the NRA from taking advantage of the *MCFL*-exemption).

Moreover, the NRA openly admits that it engages in business activities. *Compare* NRA Br. at 19 (discussing that it loses money on advertising in its magazines and sale of NRA memorabilia *but that it generates $1.7 million in rental income on leasing its building space) with MCFL*, 479 U.S. at 264 (observing that an *MCFL*-type corporations "cannot engage in business activities."). Furthermore, in *MCFL*, the plaintiff "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." *MCFL*, 479 U.S. at 264. In addition to its primary purpose of Second Amendment advocacy, the NRA also "promotes public firearm safety, trains law enforcement agencies in the use of firearms, sponsors shooting competitions, and advances hunter safety." Findings ¶ 13.

Obviously, until a fuller factual record concerning these two organizations has been developed, an as-applied challenge to Title II of BCRA is inappropriate.

potential for the appearance of corruption given the current practices of labor unions and corporations in connection with federal elections. As noted *supra*, the Supreme Court in *Bellotti* left open the possibility that in the context of candidate elections the record in a future case might be sufficient to justify restrictions on independent expenditures paid for with the general treasury funds of corporations and labor unions. *Bellotti*, 435 U.S. at 788 n.26 ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem . . . ."); *see also NCPAC*, 470 U.S. at 510 n.7 (White, J., dissenting) ("The possibility was thus left open, and remains open, that unforeseen developments in the financing of campaigns might make the need for restrictions on 'independent' expenditures more compelling . . . . The time may come when the governmental interests in restricting such expenditures will be sufficiently compelling to satisfy not only Congress but a majority of this Court as well."). In my view, this case presents just such a record. *See* Findings ¶ 2.7.

The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. Findings ¶ ¶ 2.7.3, 2.7.6. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. *Id.* ¶ ¶ 2.7.2, 2.7.8. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as "above the fray." *Id.* ¶ 2.7.2. Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where

they are being run. *Id.* ¶ 2.7.1.[124] Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress. *Id.*

The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. *Id.* ¶ 2.7.8. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. *Id.* ¶ 2.7.10.6; *see also id.* ¶ 2.7.4. After the election, these organizations often seek credit for their support. *Id.* ¶ 2.7.5; *see also id.* ¶ 2.7.4. In a similar manner, political parties are often grateful for the support of these organizations, *id.* ¶ 2.7.10, and parties have sent contributions to these organizations, *id.* ¶ 2.7.10.4. Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations. *Id.* ¶ 2.7.9.

The evidence, therefore, paints a picture of corporations and labor unions targeting particular federal candidates or their opponents-that the organizations have a specific interest in getting these particular candidates elected to federal office. The candidates and political parties are well aware of these corporations and labor unions and are cognizant of which organization is running advertisements supporting their candidacy. It is also quite clear that these candidates are very appreciative of the additional electioneering support provided on their behalf from the general treasuries of corporations and

[124] On the other hand, it is sometimes the case that when a candidate is attacked, the candidate and his/her consultants are unaware of who is running the negative advertisement because the organization running the advertisement is cloaked behind a misleading name. *See generally* Per Curiam Opinion Findings Related to BCRA's Disclosure Provisions.

labor unions. All of this creates the appearance of corruption, as is demonstrated by the polling data in the Findings.

The NRA also challenges this asserted interest, arguing that "gratitude" is not corruption. NRA Opp'n at 8-12. The NRA misses the point of Defendants' argument, which is that the electioneering broadcasts disguised as "issue advocacy," create a very significant *appearance* of corruption. Defendants never argue that "gratitude" is corruption as the NRA would have the Court believe. Rather, Defendant-Intervenors correctly observe that "[t]he result is plain: candidates can be as beholden to corporations or unions that spend money to help them through ad campaigns as they would be if the same entities wrote a check directly to the campaign, or funneled the money through the political party." Def.-Int. Br. at 108-09. In my view, the potential for the appearance of corruption-identified as the compelling justification for sections 203 and 204 of BCRA-relates to the very simple fact that when a corporation or labor union spends millions of dollars from its general treasury on a campaign, elected officials are likely to feel beholden when matters relating to these organizations arise.

In *Buckley*, the Supreme Court stated with regard to the independent expenditure restrictions on *individuals* that

> quite apart from the shortcomings of § 608(e)(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have

> virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.

Buckley, 424 U.S. at 46-47 (emphasis added). The Court in *Buckley* wrote that the threat of independent expenditures made by individuals did not "presently appear" to pose a danger of possible corruption. Therefore, *Buckley* explicitly left open the possibility that a time might come when a record would indicate that independent expenditures made by individuals to support candidates would raise an appearance of corruption. The Court concluded, in 1976:

> [S]ection 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

Buckley, 424 U.S. at 47. This discussion in *Buckley* spoke only of the lack of evidence in that record with regard to restrictions on the independent expenditures of *individuals;* an issue that has clearly not been foreclosed for *corporations*

or *labor unions*. *Bellotti*, 435 U.S. at 788 n.26 ("Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."). In my view the record assembled by the parties in this case demonstrates that a compelling governmental interest behind Congress's regulatory effort was to prevent the appearance of corruption. It is a legitimate interest and the NRA's arguments are unpersuasive.[125]

c. *Conclusion*

The compelling governmental interests identified by the Supreme Court in its campaign finance jurisprudence apply equally to Sections 203 and 204 of BCRA. Plaintiffs, aside from the NRA, do not challenge these bases as a justification for the restrictions on electioneering communications contained in Title II. Rather, Plaintiffs vigorously contend that the primary definition, as prohibited by Sections 203 and 204 of BCRA, is not narrowly tailored to serve that compelling government interest and is overbroad as a matter of constitutional law. It is this contention to which I now turn.

2. *Sections 201, 203, and 204 of BCRA are Narrowly Tailored to Serve Compelling Governmental Interests*

I find that BCRA's prohibition of corporate and labor union spending of general treasury funds on electioneering communications, as defined in the primary definition, is narrowly tailored to serve the aforementioned compelling governmental interests. In reading the floor debates leading

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[125] The NRA also argues that Title II cannot be justified as essential to prevent circumvention of Title I, NRA Opp'n at 13-15. Because I find that the first two rationales asserted by the government are sufficient, I do not need to reach whether this rationale constitutes a compelling governmental interest. Consequently, I decline to reach the NRA's argument on this point.

up to BCRA's passage, I am impressed by the care with which Congress crafted BCRA's delicate balance between regulation of issue advocacy and electoral advocacy, carefully weighing the serious First Amendment interests at stake. With Title II, Congress created an objective, impartial approach based on empirical data that provides objective indicia for distinguishing between electioneering advertisements and genuine issue discussion.

a. *Introduction*

In briefing this issue, Plaintiffs take great pains to exaggerate the reach of BCRA's electioneering communication provision-a technique no doubt designed to assist their efforts at demonstrating overbreadth. By so doing, Plaintiffs' distort the actual reach and purpose of Title II. *See, e.g.*, NRA Br. at 5 (presenting the law as a close relative of the universally condemned Sedition Acts of 1798). Given the extent to which Plaintiffs contort Title II to serve their own rhetorical purposes, it is necessary to state once again what BCRA does and does not accomplish in Title II.

The primary definition in section 201 is specifically focused on the pressing problem of corporations and labor unions using general treasury funds to directly influence federal elections under the guise of issue advocacy. Plaintiffs dismiss the primary definition in Title II as a "sweeping" "condemnation of core political speech," McConnell Opp'n at 43, and characterize the restrictions in Title II as "staggeringly overbroad." McConnell Br. at 59. Despite these statements, the primary definition of "electioneering communication" includes only communications that fulfill four, very discrete components: (a) they must be disseminated by cable, broadcast, or satellite, (b) they must refer to a clearly identified Federal candidate, (c) they must be distributed within 60 days before a general election or 30 days before a primary election, and (d) they must be targeted

to the relevant electorate. BCRA § 201(a); FECA § 304(f)(3)(A); 2 U.S.C. § 434(f)(3)(A).

Furthermore, Section 201 also contains a provision which expressly exempts four additional classes of communication from both the primary and backup definitions of electioneering communication. The four categories excluded from the definition of electioneering communication are:

> (i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;[126]
>
> (ii) a communication which constitutes an expenditure or an independent expenditure under . . . [FECA];[127]
>
> (iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or
>
> (iv) any other communication exempted under such regulations as the Commission may promulgate (consis-

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[126] The first statutorily-created exemption is almost identical to a pre-existing provision of FECA, 2 U.S.C. 431(9)(B)(i), that excludes from the definition of "expenditure" news stories and editorials broadcast or published by the media. 2 U.S.C. § 431(9)(B)(i) ("[Expenditure does not include] any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."). The parties have referred to this carve-out as the "media exemption." *See infra*.

[127] This exemption prevents double reporting of an electioneering communication if it already constitutes an expenditure or independent expenditure under the Act. Electioneering Communications, 67 Fed.Reg. 65190, 65,197-98 (October 23, 2002) (to be codified at 11 C.F.R. § 100.29(c)(3)).

> tent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) [which is a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)].

BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B). The final exemption in Section 201 provides the Commission with authority to promulgate further regulatory exemptions to the definition of "electioneering communication." However, the Commission's ability to create further regulatory carve-outs is closely circumscribed. First, any future exemption must be consistent with the requirements of the electioneering communication provision. Second, a communication cannot be exempted if it is a "public communication" "that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." BCRA § 101(b); FECA § 301(2)(A)(iii); 2 U.S.C. § 431(20)(A)(iii). As this latter limitation essentially tracks the language of the fallback definition, the statute appears to require the Commission not to stray from either definition of electioneering communication when promulgating future exemptions.[128]

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[128] Since the passage of BCRA, the Commission has promulgated two exemptions to the definition of electioneering communication. The first, exempts communications paid for by candidates for state or local office where the mention of a Federal candidate is "merely incidental" and thus not in violation of Section 301(20)(A)(iii) of FECA. Electioneering Communications, 67 Fed.Reg. at 65, 198-99 (to be codified at 11 C.F.R. 100.29(c)(5)). The second, exempts communications paid for by any charitable organization operating under Section 501(c)(3) of the Internal Revenue Code, which by law are not permitted to engage in partisan political activity. *Id.* at 65,199-200 (to be codified at 11 C.F.R. 100.29(c)(6)).

Four of the McConnell Plaintiffs are Section 501(c)(3) organizations.

McConnell Second Am. Compl. ¶¶ 30, 32, 36, 37 (identifying the Indiana Family Institute, Inc., the National Right To Life Educational Trust Fund, the Southeastern Legal Foundation, Inc., and U .S. d/b/a Pro-English as 501(c)(3) organizations). Given the FEC's regulations, I find that Court does not have jurisdiction over these four Plaintiffs on both standing and ripeness grounds. These four Plaintiffs do not demonstrate any injury-in- fact, a necessary prerequisite of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Plaintiffs have the burden of establishing standing to bring their suit by demonstrating that they have: (1) suffered an "injury in fact," (2) which is "fairly traceable to the conduct complained of," and (3) is capable of judicial redress.). Moreover, as Plaintiffs have presented "a controversy that has not yet arisen and may never arise," *Wisconsin Right to Life v. Paradise*, 138 F.3d 1183, 1187- 88 (7th Cir.1998), their claim is not ripe and the Court lacks jurisdiction to resolve their specific challenge to the electioneering communications provision. Accordingly, I do not believe that the Court has any jurisdiction over the claims of these four Plaintiffs in relation to the electioneering communication provisions in Title II.

Plaintiffs present two overbreadth challenges to Title II. First, Plaintiffs argue that the primary definition of electioneering communication applies to too many genuine issue advertisements to be considered narrowly tailored. McConnell Br. at 57-69; McConnell Opp'n at 42-48; McConnell Reply 33-40; NRA Br. at 17, 24-33; NRA Opp'n at 17-25; NRA Reply at 22-25; ACLU Reply 7-10; AFL-CIO Reply at 8-9. Second, Plaintiffs contend that Title II is unconstitutional because it applies to all corporations and does not contain a special statutory carve-out for non-profit, *MCFL*-type corporations. McConnell Opp'n at 41-42; NRA Br. at 17-24; ACLU Br. at 16-17; *see also* NRA Reply at 14-20; ACLU Reply at 2-7.

b. *BCRA's Restrictions on Electioneering Communication is Narrowly Tailored*

The restrictions in Title II on electioneering communications, as defined in the primary definition, are narrowly tailored. As discussed *supra,* Congress can permissibly regulate beyond express electoral advocacy only by ensuring that the law does not unconstitutionally burden issue discussion. In creating Title II of BCRA, Congress created a bright-line test that focuses on objective criteria common to broadcast advertisements that directly influence federal elections. By constructing this bright-line test, and avoiding a test that rests on subjectivity, Congress not only avoided the vagueness problems that plagued FECA, but also specifically linked their findings of abuse of Section 441b to the provisions in the primary definition. By using the main indicators of abuse—broadcast advertisements, aired in close proximity to a federal election, containing a reference to a candidate, and targeted to the candidate's electorate—Congress created a clear rule that constitutionally distinguishes between electioneering advertisements and genuine issue advertisements in the overwhelming majority of cases.

The Findings conclusively demonstrate that genuine issue advocacy is empirically distinguishable from issue advertisements seeking to influence a federal election. Findings ¶ 2.8. The vast majority of issue advertisements designed to influence a federal election identify a federal candidate, are run sixty days prior to a general election, or thirty days before a primary election, and are run in states or congressional districts with close races. I shall briefly examine each of these in turn.

1) Issue Advertisements Designed to Influence a Federal Election Almost Always Identify a Federal Candidate

The record in this case conclusively establish that issue advertisements designed to influence a federal election almost

always refer to a specific federal candidate. *Id.* ¶ 2.8. Political consultants who create genuine issue advertisements present uncontroverted testimony that when designing pure issue advertisements, "it was never necessary . . . to reference specific candidates for federal office in order to create effective ads." *Id.* ¶ 2.8.1.1 (Bailey) (discussing examples); *see also id.* (Strother) (pure issue ads did not mention any candidates by name). The flip side of this coin, as the consultants allude to in their testimony, is that when advertisements do mention a candidate's name, particularly in the period preceding an election, the advertisement's primary purpose is usually to influence the election. *Id.* (Bailey) ("In my decades of experience in national politics, nearly all of the ads that I have seen that both mention specific candidates and are run in the days immediately preceding the election were clearly designed to influence elections."); *id.* (Strother) ("Indeed, there is usually no reason to mention a candidate's name unless the point is to influence an election."). Expert testimony concurs in the views of the political consultants. *Id.* ¶ 2.8.1.2 (Krasno & Sorauf) ("The most obvious characteristic shared by candidate ads and candidate-oriented issue ads is their emphasis on candidates . . . . Pure issue ads, on the other hand, were much less likely to mention a candidate for federal office . . . .") (Krasno & Sorauf); ¶ 2.8.4 (Magleby) ("A number of indicia make clear that the ads run by individuals and interest groups are in reality electioneering ads that are meant to influence, and do influence, elections: These electioneering ads generally name a candidate . . . .").

This point is driven home by additional evidence, which demonstrates that advertisements run in the sixty days preceding a general election overwhelmingly mention a federal candidate and those run outside that period overwhelmingly do not mention a federal candidate. *Id.* ¶ 2.8.1.3 (discussing advertisements by Citizens for Better Medicare, Chamber of Commerce, Planned Parenthood, AFL-CIO, EMILY's List, Americans for Job Security,

Business Round Table, Handgun Control, Sierra Club, and League of Conservation Voters). These facts strongly suggest that true issue advocacy need not mention a candidate's name to be effective, and that when advertisements mention a federal candidate, they are likely to be aired in close, temporal proximity to an election as part of an effort to influence that election. This pattern is manifested repeatedly in other issue advocacy organizations' campaigns, demonstrating in an objective and unbiased manner the fact that most advertisements designed to influence federal elections refer to a federal candidate.[129] *Id.* By focusing on those advertisements that specifically refer to a federal candidate, Title II of BCRA appropriately targets issue advertisements that are designed to influence an election.[130] *Id.* ¶ 2.8.1.4.

2) A Majority of Candidate-Centered Issue Advertisements are Run in the Sixty Days Prior to a General Election and Thirty Days Prior to a Primary Election

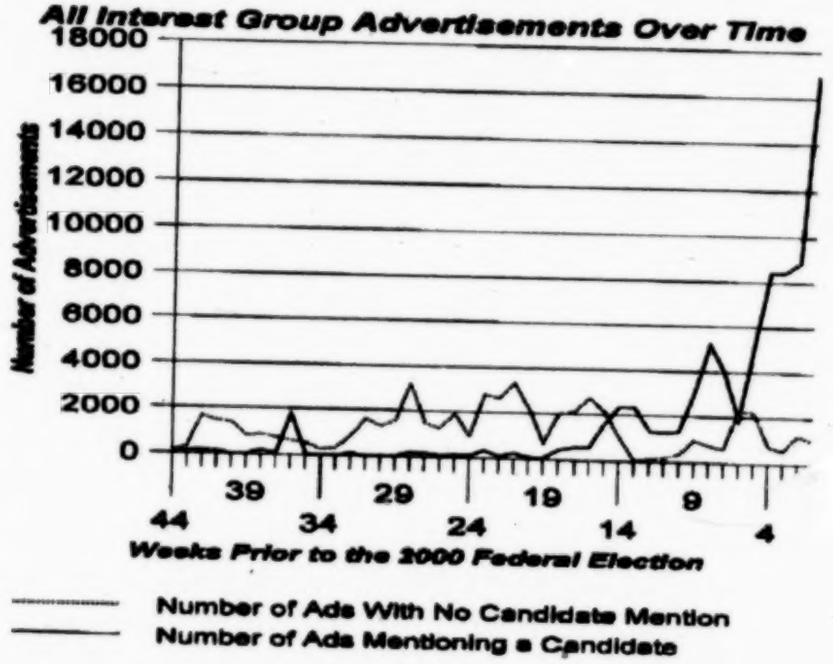
The Findings also overwhelmingly demonstrate the appropriateness of BCRA's sixty and thirty day benchmarks. While advertisements appearing outside these time frames can influence elections, Congress appropriately focused on the periods of time that most directly influence federal

[129] No similar evidence was presented by Plaintiffs to show an opposite trend or pattern.

[130] Moreover, BCRA appropriately leaves untouched advertisements paid for with corporate and labor union general treasury funds that do not refer to a federal candidate. For example in the 63 days before the 2000 election, Citizens For Better Medicare ran 14,975 advertisements, of which 4,099 did not mention a federal candidate. Findings ¶ 2.8.1.3. *None* of these advertisements that did not mention a federal candidate would be covered under BCRA. However, the 6,000 advertisements that mentioned a federal candidate and that were aired in the final three weeks of the 2000 election potentially would need to be paid for with segregated funds if the advertisements met the other criteria of the primary definition to be considered "electioneering communication."

elections. *Id.* ¶ 2.11.1. The Annenberg Study, which was not challenged by Plaintiffs, and was relied on by Plaintiffs' experts, as well as by Congress, concluded that during the 2000 federal election "[f]ully 94% of issue ads aired after August made a case for or against a candidate." *Id.* ¶ 2.8.2.1. As the following chart from the findings illustrates, issue advertisements that mention a federal candidate dramatically increase in the period before a federal election. In this case, the picture tells the entire story:

by Kenneth Goldstein illustrates this point:



Id. ¶ 2.8.2.2. In addition, uncontroverted expert testimony in this case confirms that issue advertisements aimed at influencing federal elections are aired in the period right before an election. *Id.* ¶ 2.8.2.3; *id.* (Goldstein) ("The CMAG database provides empirical evidence of a strong positive correlation between [an advertisement's reference to a federal candidate and the proximity in time of the broadcast of the advertisement to the federal election] and consequently of its

validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office."). The evidence establishes that Congress was correct to conclude that sixty days before a federal election is the time corporations and labor unions have sought to use their general treasuries to influence federal elections. *See* Findings ¶ 2.8.2.4.

The thirty-day benchmark is similarly narrowly tailored. Plaintiffs complain that no analysis of narrow tailoring "exists as to ads broadcast within 30 days of primaries or conventions, and defendants appear to have abandoned any contention that there is any basis in experience to prohibit such advertisements." AFL-CIO Reply at 3 n.2. This argument is incorrect; Defendants have put forth evidence concerning BCRA's thirty-day window and Plaintiffs have done nothing to contradict or challenge the evidence. As the Findings establish, Defendant-Intervenors were the only party to actually study the impact of BCRA on advertisements run during the 2000 primary election period. Findings ¶ 2.11.5.3. The Defendant-Intervenors found only 76 distinct advertisements which aired more than 60 days before the general election from the CMAG database, comprising 16,916 airings. *Id.* Of these advertisements, only three percent of the *airings* (522 out of 16,916) named a candidate and were aired within 30 days of the candidate's primary. *Id.* Defendant-Intervenors observed that of the advertisements identifying a candidate and airing within 30 days of a 2000 primary election, only 1.2 percent were coded as "genuine issue advertisements." *Id.* Defendants' experts Krasno and Soraufmake a similar finding. *Id.* ¶ 2.11.5.2. These experts observe that the "hodgepodge of different primary dates makes it difficult to factor [the 30 day primary window] into the analysis, but we are confident that it would have little effect on the proportion of pure issue ads incorrectly captured by BCRA for the simple reason that so few of these advertisements mention candidates at all. Indeed, our examination of 1998 shows this to be true: no pure issue ads would have been captured by the 30-day primary period." *Id.* Plaintiffs make absolutely *no* effort to challenge this data, and I find the evidence sufficient to demonstrate that the thirty-day time frame is supported by the record in this case.

Indeed, the closest Plaintiffs come to challenging Defendants' on this point is the AFL-CIO's citation to 336 cookie-cutter advertisements aired over three election cycles, only 50 of which would have been even covered by BCRA's provisions. Findings ¶ 2.11.5.1. I discuss these advertisements in more detail, *infra*, however it is clear that this evidence represents the political advertising activity of only one interest group, albeit a particularly active one. As such, this submission does not directly address Defendants' analysis which examines BCRA's effect on issue advocacy during the primary cycle in general. I, therefore, find that this AFL-CIO evidence does not change my finding that BCRA's thirty-day period is supported by the record as being narrowly tailored to achieve the governmental interest at stake.

Moreover, Defendants provide uncontroverted evidence that the effect of advertisements run during a primary can be just as damaging as advertisements run during the general election. The record demonstrates that interest group broadcast advertisements had a substantial effect on the outcome of the 2000 Congressional race in Florida's Eighth district, particularly with the advertisements run by The Club for Growth during the primary. *Id.* ¶ 2.6.5.5 (Pennington); *see also id.* ¶ 2.10.2 (Pennington) (noting that radio advertisements by Americans for Limited Terms attacking Mr. Keller's opponent on taxes and other issues was quite effective). The Club for Growth and Republican candidate Ric Keller had made their relationship well known, and the Club for Growth ran advertisements particularly helpful to Mr. Keller including one entitled "Keller Sublette Higher Taxes." *Id.* ¶ 2.6.5.5 (Pennington). Keller's Republican primary opponent, Bill Sublette, had been the front-runner

until this advertising campaign by The Club for Growth began. *Id.* Rocky Pennington, Mr. Sublette's campaign consultant, observed that Sublette would have garnered 50 percent of the vote in the Republican primary and not have had to face a run-off primary contest had it not been for The Club for Growth advertisements. *Id.*

After the election, in June of 2001, Congressman Ric Keller signed a Club for Growth fundraising letter stating:

> The Club for Growth selected my race as one of its *top priorities* . . . . Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress.

Id. ¶ ¶ 2.7.4 (underline in original, italics added for emphasis). In my judgment, the Keller-Sublette primary election advertising example epitomizes the reason Congress extended the prohibition on electioneering communications to 30 days within primary elections. It also demonstrates that simply because a primary election does not ultimately produce an officeholder, since the winner only receives a chance to run for elected office, the risk of corruption is still clearly present. *See* Findings ¶ 2.6.6.5 (New Hampshire Presidential primary election advertisements referencing Senator McCain). The thirty-day prohibition around primaries is therefore supported by the record.

The sixty and thirty-day figures are not arbitrary numbers selected by Congress, but appropriate time periods tied to empirically verifiable data. The Findings persuasively demonstrate that advertisements designed to influence afederal election mention the name of a candidate and appear in the sixty and thirty days before a federal election or primary contest. The primary definition of electioneering communication is narrowly tailored because it focuses only on these periods of time, where it has been shown that candidate-centered issue advocacy is at its zenith and the influence of these advertisements on federal elections is at its

strongest. Indeed, expert testimony likewise concludes that the majority of issue advertisements that mention a federal candidate appear in the period before an election. *Id.* ¶ 2.8.2.3.

Unlike Judge Leon, I am equally unpersuaded by Plaintiffs' claim that the legislative calendar requires the running of issue advertisements during the periods covered by BCRA. *See, e.g.*, AFL-CIO Br. at 10-11; Findings ¶ 2.11.8. I do not find that Plaintiffs have presented sufficient evidence to demonstrate this proposition. Findings ¶ 2.11.8.3. In many instances, Plaintiffs conclusively allege that legislative activity occurs during this time frame without providing either specific examples from the legislative calendar or examples from their own issue advertising campaigns addressing these legislative issues. *Id.* ¶ 2.11.8.1. The actual examples of some advocacy tied to specific pending legislation Plaintiffs present are comparatively few and I conclude are not sufficient to demonstrate that BCRA is overbroad. *Id.* ¶ 2.11.8.2. Importantly, Plaintiffs never overcome the fact that all issue advertisements that refer to a federal candidate, that are run in close proximity to a federal election, and that are targeted to the candidate's electorate influence the outcome of the federal election. *Id.* ¶ 2.11.2. Nor do they overcome the evidence showing that most "pure" issue advertisements do not mention the name of federal candidates. *Id* ¶ 2.8.1.1. Congress properly concluded that advertisements mentioning a candidate run in this time frame have an electioneering affect, even if they are run for a different purpose, and if these advertisements were paid for by corporations and labor unions, Congress concluded, consistent with longstanding policy, to require that these advertisements be paid for with segregated funds specifically designated for election purposes.

Additionally, the record establishes that it is a disputed issue of fact as to whether it is even effective to run

"genuine" issue advertisements in the immediate run-up to a federal election. Findings ¶ 2.11.7. Political consultants, current and former candidates and officeholders, and Defendants' expert witnesses contend that it is ineffective to run issue advertisements in close proximity to a federal election, and as a result, advertisements about issues run during that time frame are likely designed to influence federal elections. *Id.* ¶¶ 2.11.7.1-2.11.7.2. Plaintiffs respond that it is necessary to run issue advertisements that mention the name of a federal candidate close to an election because of the public's greater interest in public affairs during that time frame. *Id.* ¶¶ 2.11.7.3-2.11.7.4. Because this issue is disputed, I reach no conclusion on this matter. What I do conclude is that with the primary definition of electioneering communication, the test does not focus on the objective behind the advertisement but rather objective determinants that have been empirically proven to distinguish issue advertisements that influence federal elections from other types of issue advertising.

Given the record presented to the Court, I conclude that BCRA captures the overwhelming majority of advertisements that are designed to affect federal elections. Even if the primary purpose of a broadcast advertisement is to pressure a Member of Congress on pending legislation, the record demonstrates that advertisements mentioning a federal candidate that run in close proximity to a federal election that are targeted at that candidate's electorate have a serious impact on elections. Still, BCRA only requires that these advertisements be paid for with segregated funds as opposed to general treasury funds.

3) Most Candidate-Centered Advertisements That Mention a Candidate for Federal Office Are Run in States and Congressional Districts With Close Elections

The Court's Findings conclusively demonstrate from the evidence that issue advertisements designed to influence a

federal election are focused predominantly on close races. Findings ¶ 2.8.3. Expert and political consultant testimony, as well as empirical data, all demonstrate this fact. *Id.* The obvious reason for focusing primarily on close races is that corporations and labor unions endeavor to receive the most value out of each dollar spent on advertising in order to maximize their influence on elections. Even Plaintiff NRA admitted to focusing its advertisements on competitive races. *Id.* ¶ 2.8.3.5.

In my judgment, tailoring BCRA to apply only to "competitive races" would create line-drawing difficulties that would make such a law unconstitutional. However, the primary definition of electioneering communication is narrowly tailored in that it only focuses on broadcast advertisements that are targeted to the relevant electorate of each candidate. This means that, in the case of House and Senate races, the communication will not constitute an "electioneering communication" unless 50,000 or more individuals in the relevant congressional district or state that the candidate for the House or Senate are seeking to represent can receive the communication. BCRA § 201; FECA § 304(f)(3)(C); 2 U.S.C. § 434(f)(3)(C). Broadcast advertisements that target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude. I find that by applying only to a candidate's relevant electorate, the primary definition of electioneering communication is narrowly tailored.

4) Legal Conclusions Relating To Expert Reports and Plaintiffs' Sample Advertisements

In my Findings and in the Appendix to this Opinion, I have made an effort to describe thoroughly the various expert reports purporting to demonstrate the problems created by issue advocacy advertisements affecting federal elections, as well as the narrow tailoring Congress achieved in BCRA to

avoid affecting federal non-electioneering advertisements. I have also devoted a great deal of effort and care to lay out the criticisms of these studies proffered by Plaintiffs' expert, and the responses to that criticism by Defendants' experts. I have done so because the record demonstrates that a number of the reports, such as the *Buying Time* and the Annenberg Center studies, were relied upon by Congress in its consideration of BCRA and the parties have presented the Court with a wealth of material aimed at bolstering or discrediting them. In addition, Plaintiffs have attempted to demonstrate BCRA's overbreadth by discussing a series of advertisements that they claim would be unfairly captured under the primary definition of electioneering communication. The problem with this approach is that it asks the Court to sit as the viewer and find that these advertisements were pure issue advertisements. The *Buckley* Court warned against a statutory test that relied on the viewer and listener's interpretation of a political message. I have declined, therefore, to engage in this exercise. As my Findings discuss, I have reviewed Plaintiffs' submission, including all of their cited advertisements, and conclude that they do not demonstrate BCRA's overbreadth. *See* Findings ¶ 2.11.3-2.11.5.

Turning to the experts, as indicated in my Findings, I find that much, though not all, of the relevant evidence presented by the Defendants has merit and has not been discredited by Plaintiffs' expert, Dr. Gibson, whose criticism focused on the *Buying Time* studies. *Id.* ¶ 2.12. At the outset, it is worth pointing out that the conclusions reached in Dr. Goldstein's Expert Report are unrebutted on the following points: interest group advertising in 2000 was concentrated in so-called "battleground" states; roughly 11 percent of candidate-sponsored advertisements in 2000 used express advocacy terminology; interest group advertisements, which identified a candidate in 2000, tended to be broadcast within the final 60 days of the election campaign, whereas those that did not identify a candidate were spread more evenly throughout the

year; and interest group advertisements that mentioned candidates in 2000 were highly concentrated in "battleground states." *Id.* ¶ 2.12.3. Dr. Goldstein's uncontroverted conclusions further demonstrate that BCRA's primary definition of electioneering communications narrowly focuses on the key empirical determinants that separate genuine issue discussion from electioneering.

Plaintiffs have attempted to discredit the *Buying Time* reports primarily through the expert reports of Dr. Gibson. Dr. Gibson presents various criticisms of the reports in an effort to have the Court dismiss them or find Dr. Gibson's alternative conclusions more acceptable. As I mentioned in my Findings, the effort is not unlike that of a piñata party: if one hits the piñata enough, it will eventually crack apart. *Id.* ¶ 2.12.4. Although some of these "hits" have merit, I point out that neither Plaintiffs nor Dr. Gibson have attempted to conduct their own similar study, or even replicate a discrete portion of the *Buying Time* studies, despite the fact that the underlying materials were provided to them by Defendants. Presenting the Court with contrary results from such a study would have been far more persuasive than the recalculations of *Buying Time* data and the often conjectural and speculative criticism proffered by Plaintiffs and Dr. Gibson.

Importantly, much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert. For example, Plaintiffs have not challenged the conclusions in *Buying Time* that very few advertisements utilize express advocacy terminology, and that interest group advertisements which identify candidates are concentrated toward the end of the election campaign. *Id.* ¶ 2.12.7. I find that this objective data is insulated from the great majority of criticism leveled at the *Buying Time* reports. *Id.* (Dr. Gibson commenting that "[e]ntirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability."). Furthermore,

some of these results are supported by those of the unrebutted Annenberg Reports. *Id.*

As my Findings discuss, I have not accepted either side's discussion of the conclusion in *Buying Time 1998* related to the percentage of genuine issue advertisements that would be affected by BCRA. *Id.* ¶¶ 2.12.5-2.12.9. *Buying Time 1998* finds that seven percent of genuine issue advertisements aired over the course of 1998 were aired in the final 60 days of the election campaign and mentioned a candidate, and Dr. Krasno determined that out of all of the advertisements identifying a candidate sixty days before the 1998 election, 14.7 percent were "genuine" issue advertisements. *Id.* ¶ 2.12.8. Dr. Gibson presented figures from the *Buying Time 1998* data ranging from 16 percent to 60 percent. *Id.* I have found that given the record it is impossible to determine which expert's view of the student coding is correct, and as such I find this matter in dispute and do not accept either side's conclusion on the likely effect BCRA would have based on the *Buying Time 1998* data.

In regard to *Buying Time 2000*, I do not accept its finding that, of all of the issue advertisements run within 60 days of the 2000 election that mentioned a candidate, 0.6 percent were genuine advertisements. *Id.* ¶ 2.12.10. I reached this conclusion primarily because Dr. Goldstein finds that if one includes all of the advertisements that Plaintiffs allege were recoded from genuine to electioneering commercials, the most "conservative" calculation of advertisements aired in the final 60 days of the 2000 election also identifying a candidate, which were "genuine," is 17 percent. *Id.*[131] This figure is not rebutted by Plaintiffs or their expert.

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[131] Dr. Gibson also argues that since the majority of advertisements coded as electioneering were also coded as having policy matters as their primary focus, the studies in fact demonstrate that the vast majority of advertisements captured by BCRA are genuine issue advertisements. As the Findings demonstrate, I reject this argument. Findings ¶ 2.12.11. Defendants' experts have clearly demonstrated that the fact an advertisement may focus on issues does not preclude the possibility that the advertisement is designed to promote a candidate. *Id.* Dr. Lupia's beer commercial analogy illustrates this point effectively. *Id.* Furthermore, the results for candidate-sponsored advertisements demonstrate that even when a candidate running for office airs an advertisement in an effort to win election, he or she more often than not focuses those commercials on policy matters and not on personal characteristics of the candidates. *Id.*, *see also supra* ¶ 2.3.2 (Bailey).

As I also explain in my Findings, I view these calculations as largely an academic exercise. *Id.* ¶ 2.12.12. The expert testimony in this case demonstrates the subjective nature of the effort of trying to capture mental impressions of viewers, and illustrates how one person's genuine issue advertisement can be another's electioneering commercial. *Id.* ¶ 2.8.5. This is why BCRA's framers have used objective criteria to define "electioneering communication." Furthermore, as Dr. Lupia explains, these exercises can help us determine what BCRA's impact would have been on past behavior, but they do not necessarily tell us how BCRA will affect non-electioneering issue advertisements in the future. *Id.* For example, the NRA claims that its 30-minute "news magazine" titled "California," is genuine issue advocacy but it would be unfairly affected by BCRA because it showed an image of the group's periodical, which featured a picture of Vice President Al Gore on the cover for a few seconds. App. ¶ I.D.8.h. The advertisement was aired within 60 days of the 2000 election, and therefore would fall into BCRA's "electioneering communication" definition. I would note that it is clear that the NRA views Vice President Gore's presence in the advertisement as a coincidence and not a vital part of the commercial. *Id.* ¶ I.D.8.h. As such, one would expect that with the enactment of BCRA, the NRA would change its behavior. The NRA could leave the advertisement unchanged and only air it more than 60 days before an election, or more

than 30 days before a primary, and escape BCRA's coverage. The NRA could also show a periodical with a different cover and air the advertisement whenever it liked. Or, the group could leave the advertisement unchanged, run it within the 60 day window and pay for the commercial from its PAC funds. This is one example, but it illustrates the point that trying to determine the number of advertisements that will be unfairly subjected to BCRA based on past behavior does not account for adaptation of that behavior based on the new reality.

The fact that some genuine issue advertisements identified a candidate and were aired within 60 days of an election in the past does not mean that the candidate's presence was an essential, as opposed to an incidental, aspect of the commercial, or that such a percentage will remain constant. However, even if such conclusions could be drawn, it appears that the least contested figure presented to the Court is that 17 percent of advertisements in 2000 that would have been affected by BCRA were "genuine" issue advertisements. This figure is one of the reasons that Judge Leon finds the primary definition of electioneering communication to be substantially overbroad. I cannot agree with Judge Leon. First, I find these debates over "actual" percentages of genuine issue advocacy illustrative of why the Supreme Court in *Buckley* found that regulations relating to the subjective intent of the listener to be flawed. Trying to discern whether an advertisement is electioneering or issue advocacy is very difficult and open to debate. *See* Finding ¶ 2.8.5. Second, this number is the outermost number of "genuine" issue advertisements that would be covered under BCRA; strong arguments can be made that the number should be reduced. Given the evidence in this case that broadcast advertisements aired in close proximity to a federal election, that mention the name of a candidate, and that are targeted to the candidate's electorate directly influence federal elections, I find that Congress was correct to establish an objective test for determining what constitutes electioneering. In other words, even if I were to

accept the 17 percent figure as a valid metric for determining overbreadth, I find that the any such impact of BCRA is substantially counterbalanced by the record in this case and the objective empirical determinants related to these advertisements. For these reasons, I do not find Dr. Goldstein's conservative estimate of 17 percent to deem BCRA's primary definition of electioneering communication substantially overbroad.

Plaintiffs, as noted above, did not conduct their own empirical study like the *Buying Time* study, but instead provided the Court with examples of advertisements that they claim BCRA would have captured had it been in effect when they were aired. The McConnell Plaintiffs provided a CD-ROM containing 21 advertisements they claim provide "powerful illustrations of the amount and type of issue advocacy that would be prohibited by BCRA's primary definition of 'electioneering communications.'"[132] *Id.* ¶ 2.11.3. However, nine of these advertisements would not fall under BCRA's definition of electioneering communication because they either were not targeted at a relevant electorate or were not aired within 30 or 60 days of a primary or general election. *Id.* ¶ 2.11.3.1. Four of the remaining advertisements focus on a candidate's past votes with no reference to any pending or future legislation. *Id.* ¶ 2.11.3.2. I reject the notion that these advertisements are examples of genuine issue advocacy. *Id.* ¶ 2.11.3.3. It is difficult to imagine what purpose an advertisement would have other than to promote the election or defeat of a candidate when it is aired within 60 days of an election or 30 days of a primary, clearly identifies

[132] As noted numerous times in this opinion, BCRA would not "prohibit" these advertisements. These advertisements can be run, unaltered, if paid for from segregated funds. In addition, if the advertisements are not run in the candidate's electorate, BCRA places no restrictions on these advertisements. If the advertisements are run more than 30 days before a primary or 60 days before a general election, BCRA imposes no restrictions on these commercials.

a candidate, runs in that candidate's electoral district, and focuses on the candidate's past voting record without referring to pending future legislation. Take, for example, the AFL-CIO's "Protect" advertisement:

> PHARMACIST: The Senior Citizens today can't afford their medication. They come in and I know they're skipping medication so they can pay for their food. With the rising cost of medication today, it could wipe out anybody at any time.
>
> VOICE: Yet Congressman Jay Dickey sided with the drug industry. He voted no to guaranteed Medicare prescription benefits that would protect seniors from runaway prices. Tell Dickey quit putting special interests ahead of working families.
>
> PHARMACIST: Watching people walk away without the medication takes a little bit out of me every day.

Id. ¶ 2.6.7.1. The argument that this advertisement, and those like it, was aired to promote an issue, and not to attack a candidate, strains credulity. Therefore, out of these 21 self-selected, and presumably most self-serving advertisements McConnell Plaintiffs provided the three-judge panel, eight at most are genuine issue advertisements that would be affected by BCRA.[133] *Id.* ¶ 2.11.3.4.

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[133] I state "at most" due to the fact that Defendants have provided background for almost all of the advertisements presented by Plaintiffs to the Court as genuine issue commercials. Examining the advertisements with knowledge of the context in which they were aired raises serious doubt in my mind that the true purpose of some of these communications was to promote issues as opposed to candidates. Indeed, the uncontroverted expert testimony states that in assessing the true purpose of an advertisement it is very important to view the advertisement in the context of the election in which it was run, rather than as part of a cold, factual record. Findings ¶ 2.8.5 (Strother). For example, one advertisement submitted by the McConnell Plaintiffs exhorts viewers to "call" incumbent Senator Lauch Faircloth "today and tell him to keep up his fight [against trial lawyers]. Because if trial lawyers win, working families lose." *Id.* ¶ 2.8.5.2. From a detached perspective, this advertisement appears to be advocating an anti-trial lawyer policy; however, when one is informed that Senator Faircloth's opponent was now-Senator John Edwards, a prominent trial lawyer, and that advertisements both supporting and opposing Senator Edwards focused on his trial lawyer credentials to the point that the phrase "trial lawyer" was synonymous with John Edwards, it is difficult to view the advertisement as anything other than electioneering. *Id.* However, as noted *supra*, ascertaining a political advertisement's true purpose is often a subjective exercise, one that Congress elected not to include in BCRA's primary definition of "electioneering communication." As such, unless there is an objective factor indicating that a proposed "genuine" advertisement is in fact an electioneering commercial, I will accept Plaintiffs' characterizations in the interests of a conservative and objective analysis. The conservative figure above also includes "Save," which criticizes a candidate's past vote but urges viewers to call the Member of Congress and "tell him to vote *no* when the Gingrich plan comes up again," intending, according to the AFL-CIO, "to influence House Members in the event that the bill returned for another vote in the [House]." Findings ¶ 2.11.3.2.

In addition, Defendants identify 39 advertisements that appear in Plaintiffs' briefings, which Plaintiffs claim are genuine issue advertisements. *Id.* ¶ 2.11.4. In addition to these 39 advertisements, I have found four additional advertisements alleged in declarations to be examples of legislative-centered advertisements that would be affected by BCRA, *id.*, as well as a large number of cookie-cutter advertisements alluded to in the AFL-CIO's Opening Brief, which the group claims would be unfairly affected by BCRA's 30-day primary window, *id.* ¶ 2.11.5. I address the groupings of advertisements in turn.

The 39 advertisements scattered throughout Plaintiffs' briefs include 12 NRA advertisements which the group only identifies as having been aired sometime in 1994, and 13 commercials sponsored by the same group that aired in March of 2000, but mentioned only President Clinton who was not then a candidate for office. *Id.* ¶ 2.11.4.1. On these bases, I exclude these NRA commercials from consideration.

I also exclude the ACLU's advertisement as an example of a "genuine issue advertisement" since it is clear that it was engineered to provide the group standing to challenge BCRA and is the only example of a past "electioneering communication" made by the group. *Id.* ¶ 2.11.4.2. I reject another, the AFL-CIO's "Sky," since it, like the four in the McConnell Plaintiffs' 21 advertisement submission described *supra*, criticized a Member of Congress's past vote without reference to any pending or future legislation. *Id.* ¶ 2.11.4.3. Therefore, out of these 39 advertisements Plaintiffs used in their briefings to illustrate the unfairness of BCRA, 12 at most are genuine issue advertisements that would be affected by BCRA.[134] *Id.* ¶ 2.11.4.6.

Four other advertisements were cited by Plaintiffs in declarations as being motivated by pending legislation and happened to run within the 30 or 60-day BCRA windows. *Id.* ¶ 2.11.4.5 ("No Two Way," "Spearmint," "Spear," and the Gun Owners of America's armed pilots advertisement). For purposes of this analysis I accept Plaintiffs' characterization of these commercials. *But see supra* note 133.

Finally, the AFL-CIO mentions that a number of its legislation-focused advertisements would be affected by BCRA's 30-day window. Looking at the "flights" of

[134] Again I use the qualifier "at most" due to the presence of advertisements whose context makes me question the notion that they are genuine issue advertisements and not electioneering commercials. *See supra* note 133. This conservative figure includes: the Associated Builders and Contractor's advertisement on penalties for child molesters, a subject that the group acknowledges "is not [an issue of] particular concern to the general public of contractors or general group of contractors;" Findings ¶ 2.6.6.2, and the NRA's "Tribute" where Charlton Heston discusses "winning in November" and states "as we set out this year to defeat the divisive forces that would take freedom away, I want to say these fighting words for everyone within the sound of my voice to hear and to heed and especially for you, Mr. Gore. "From my cold dead hands." Findings ¶ 2.11.4.4 (emphasis in original).

advertisements detailed in its submissions, it appears that the vast majority of the "cookiecutter" advertisements that made up these flights would not have been affected by BCRA. Findings ¶ 2.11.5.1; *see also* App. ¶ II.A. Out of 336 cookie-cutter advertisements cited to by the AFL-CIO, 50 would have been regulated by BCRA. Finding ¶ 2.11.5.1; *see also* App. ¶ II.A. The rest were part of the same lobbying efforts, but were not aired within 30 days of a named-candidate's primary. Finding ¶ 2.11.5.1; *see also* App. ¶ II.A.

These Plaintiff-produced advertisements provide very little insight into what effect BCRA would have had on political advertising in the past, or the effect it is likely to have in the future. Of the 400 self-selected advertisements proffered by Plaintiffs as illustrations of the overbreadth of BCRA, presumably the best examples available, less than 20 percent (79/400) would have been affected by BCRA, even if the five advertisements focusing on past votes in the absence of pending legislation are considered genuine issue advocacy. Furthermore, Plaintiffs do not attempt to compare the volume of these advertisements with a comparative total number of advertisements or airings of advertisements. Consequently, I am left with no idea as to what these advertisements represent in terms of the overall quantity of distinct advertisements aired over the *four* election cycles (1994, 1996, 1998, and 2000) in which Plaintiffs' proffered advertisements were aired. These examples do little to convince me of BCRA's overbreadth, and if anything, suggest the opposite conclusion.

5) Conclusion Relating to Narrow Tailoring

In my judgment, BCRA's restriction on electioneering communication is narrowly tailored to achieve the related compelling governmental interests. In devising Title II, Congress followed the clear instruction from the Supreme Court in *Buckley*-that limitations upon political speech could not hinge on the subjective intent of the listeners. *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535

(1945)). Instead, Congress focused on objective facts and concluded that issue advertisements designed to influence a federal election shared a number of characteristics: first, the vast majority of issue advertisements run in the period before an election mention a federal candidate; second, these commercials are run in the sixty and thirty days before general or primary elections; and third, these advertisements are targeted at the most competitive races. In devising the primary definition of electioneering communication, Congress constructed a rule that only touched advertisements matching the criteria Congress found to be problematic: broadcast advertisements, referring to a federal candidate, targeting the candidate's electorate, run in close proximity to a federal election. Corporations and labor unions that desire to spend general treasury funds on advertisements fitting these characteristics can do so; they simply must pay for them with funding committed for that purpose by individuals who agree with the message of the union or corporation.

Congress properly determined that genuine issue advocacy can be discerned empirically from electioneering advocacy. In crafting Title II, it arrived at a definition of electioneering communication that matched its findings. It is very difficult to argue with Congress's conclusion that broadcast advertisements mentioning a federal candidate, run in close proximity to the candidate's election, and targeting the candidate's electorate do not have a significant influence on federal elections. In my judgment, Congress was correct to compel corporations and labor unions to pay for these advertisements with segregated funds committed to the purpose of electioneering in federal elections.

c. *Section 204 of BCRA Does Not Render Title II Fatally Overbroad*

Plaintiffs also argue that the restrictions on electioneering communications in Title II are not narrowly tailored because they apply to all corporations and do not provide for a

specific statutory carve-out for corporations fitting the characteristics of the plaintiff in *MCFL*. With the Snowe-Jeffords' provision, BCRA appeared to provide for an exception to the electioneering communication ban for certain types of corporations; however, this exception has been eliminated by the "Wellstone Amendment," now codified in Section 204. The Snowe-Jeffords Provision would have permitted section 501(c)(4) organizations and section 527(e)(1) organizations to make electioneering communications provided that the organizations paid for these communications with money contributed by individuals, disclosed the names and addresses of those individuals who had given more than $1,000 to the account that paid for the communication, and, in the case of 501(c)(4) organizations, ensured that corporate and individual contributions were segregated into two separate accounts. The Wellstone Amendment, however, takes this exception away and requires corporations organized under section 501(c)(4) and section 527(e)(1) of the Internal Revenue Code to use segregated funding for electioneering communications. The Wellstone Amendment was codified in a separate section of BCRA in order to preserve severability; however, as I am persuaded that the Wellstone Amendment is constitutional, I do not find it necessary to sever it from BCRA.

Notably, the language in the Snowe-Jeffords Provision is silent as to whether or not corporations of the type identified in *MCFL* would be included within the parameters of its exception. In *MCFL*, the Supreme Court found that the prohibition in Section 441b on making independent expenditures containing words of express advocacy was unconstitutional *as applied* to a certain nonprofit, nonstock corporation. *MCFL*, 479 U.S. at 241. The Supreme Court's decision created an as-applied carve-out for certain nonprofit corporations that met three characteristics of the corporation at issue in the case which were "essential" to the Supreme Court's holding. *Id.* at 263. First, the corporation was

"formed for the express purpose of promoting political ideas, and cannot engage in business activities [which] ensures that political resources reflect political support." *Id.* at 264. Second, the corporation did not have any "shareholders or other persons affiliated so as to have a claim on its assets or earnings [which e]nsures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Id.* Third, the corporation "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities [which] prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.*

The decision in *MCFL* stands for the proposition that the prohibition on independent expenditures containing words of express advocacy is unconstitutional as applied to a "small" group of qualified nonprofit corporations that fit the parameters set out by the majority in *MCFL*. *Austin*, 494 U.S. at 672 (1990) (Brennan, J., concurring). Although FECA was not amended by Congress in the wake of *MCFL*, the Commission eventually promulgated regulations exempting corporations fitting the criteria of *MCFL*, or Qualified Nonprofit Corporations ("QNCs"), from the prohibition on independent expenditures (expenditures containing words of express advocacy). 11 C.F.R. § 114.10(d)(1) ("A qualified non-profit corporation may make independent expenditures, as defined in 11 C.F.R. § 100.16, without violating the prohibitions against corporate expenditures contained in 11 C.F.R. part 114."). In defining what kind of corporation can receive QNC status, the Commission has hewed closely to the characteristics of the corporation in *MCFL*. *See* 11 C.F.R. § 114.10(c).

Given that Congress has never expressly codified the *MCFL* characteristics, it is not unexpected that the Snowe-

Jeffords Provision never indicates whether QNCs would be included within the ambit of its exception. Nevertheless, the Snowe-Jeffords Provision, by its terms, appears to include QNCs. The Snowe-Jeffords provision applies to all section 501(c)(4) organizations and all section 527(e)(1) organizations without exception. In addition, the Snowe- Jeffords Provision permits certain section 501(c)(4) organizations and certain section 527(e)(1) organizations to make electioneering communications, provided that the funds used to pay for those communications comes from individuals who disclose their names and addresses. The regulations defining a QNC mandate that for a corporation to receive QNC-status, the corporation cannot receive corporate donations. 11 C.F.R. § 114.10(c) (4)(ii).[135] By its terms, the Snowe-Jeffords Provision would therefore appear to encompass QNCs.[136]

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[135] Some courts have found that the regulations establishing the test for which corporations qualify for QNC-status is too rigid and excludes corporations that legitimately deserve recognition under a more functional-based approach (for example, where the corporation has accepted a *de minimis* amount of corporate donations). *See North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir.1999), *cert. denied*, 528 U.S. 1153 (2000) ("We agree with those circuits that have addressed the question, each of which has held that the list of nonprofit corporate characteristics in *MCFL* was not 'a constitutional test for when a nonprofit corporation must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in MCFL.'") (quoting *Day v. Holahan*, 34 F.3d 1356, 1363 (8th Cir.1994)); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir.1995); *see also FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 190-91 (D.C.Cir.2001). Even if a QNC were permitted to accept a *de minimis* amount of corporate contributions, it would still be able to qualify for Snowe-Jeffords by paying for its communication with funds from a segregated account that contains funding from individuals only.

[136] The disclosure of names and addresses of individual contributors is not any more restrictive than the disclosure that the corporation in *MCFL* was forced to make. *MCFL*, 479 U.S. at 262 ("Even if § 441b is inapplicable, an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will

The Wellstone Amendment was added by Congress to force all corporations to fund their electioneering communications through political action committees with federal funds. 147 Cong. Rec. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Paul Wellstone) ("Let me be clear, this amendment does not say any special interest group cannot run an ad . . . . It only says these groups and organizations need to comply with the same rules as unions and corporations. Groups covered by my amendment can set up PACs, they can solicit contributions, and they can run all the ads they want. All this amendment says is they cannot use their regular treasury money. They can't use the soft money contributions to run these ads."). Under the Snowe-Jeffords Provision, individuals could have given unlimited amounts of nonfederal money to section 501(c)(4) organizations and section 527(e)(1) organizations and these groups would have been permitted to engage in electioneering communications provided that the groups paid for the advertisements with the funding contributed by the individuals. The Wellstone Amendment compels these organizations to fund all of their electioneering communications through a political action committee using federal funds.

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be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act."). Under the Snowe-Jeffords Provision, only individuals who have contributed $1,000 in the aggregate during a calendar year would have to disclose their names and addresses.

The Wellstone Amendment does not explicitly mention the status of corporations fitting the characteristics of an *MCFL* corporation. During the final passage of BCRA in the Senate, Senator McCain indicated that "[j]ust as an *MCFL*-type corporation, under the Supreme Court's ruling, is exempt from the current prohibition on the use of corporate funds for expenditures containing 'express advocacy,' so too is an *MCFL*-type corporation exempt from the prohibition in the Snowe-Jeffords amendment on the use of its treasury funds to pay for 'electioneering communications.'" 148 Cong. Rec. S2141 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).[137]

Picking up on Senator McCain's statement, the FEC-in the recently promulgated regulations implementing BCRA-has created an exemption for QNCs to make electioneering communications. 11 C.F.R. § 114.10 (A qualified nonprofit corporation may make electioneering communications, as defined in 11 C.F.R. 100.29, without violating the prohibitions against corporate expenditures contained in 11 C.F.R. part 114."). Although not expressly provided for in the Wellstone Amendment, under Commission regulations, QNCs are permitted, therefore, to spend unlimited amounts of

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[137] The reference Senator McCain makes to the Snowe-Jeffords' Provision is to the entire prohibition on corporate and labor union general treasury funds being used for electioneering communications, which was also known as "Snowe-Jeffords" throughout the legislative history. Thus, Senator McCain is not referring to "Snowe-Jeffords" as it has been discussed in this opinion as an exemption for section 501(c)(4) and section 527(e)(1) organizations. Electioneering Communications, 67 Fed.Reg. at 65204 ("Senator McCain specifically referred to that part of the Snowe- Jeffords amendment that prohibits the use of [a corporation's] treasury funds to pay for electioneering communications, the main provision of this amendment that remains unaltered by the passage of the Wellstone amendment.") (internal citation and quotation marks omitted) (second brackets in original).

money on electioneering communications based on the implementing regulations by the FEC.

I am convinced that Section 204 is constitutional in its present state and would leave for another day, in the context of an as-applied challenge, a determination of whether the FEC's regulations apply too narrowly and exclude corporations that should qualify for QNC-status. In my judgment, it was permissible for Congress not to exempt nonprofit corporations as a specific class from BCRA's restrictions on the general-treasury funding of electioneering communications. It goes without saying, and even Defendants concede, that *MCFL* establishes that FECA's (and now BCRA's) restrictions on the use of corporate treasury funds cannot constitutionally be applied to certain nonprofit corporations. Def.-Int. Opp'n at 65. However, given the FEC's regulations, I feel any argument relating to an *MCFL* exemption is premature. Any corporation that believes it should fall within *MCFL* may seek exemption under the FEC's regulations.[138] Moreover, if any corporation thinks that the Commission's regulations are too narrow in defining an *MCFL*, they may challenge them on that basis at the appropriate time. As the Defendant- Intervenors nicely phrase the inquiry: "The question is whether the new provisions added to FECA by BCRA may constitutionally be applied to the same set of corporations (and, of course, unions, other groups, and individuals) to which FECA's existing provisions have long applied, and continue to apply." Def.-Int. Opp'n at 67. I answer that question in the affirmative and find that organizations like the NRA or ACLU that desire *MCFL* treatment in order to be exempted under BCRA need to present such a claim in the future as was done by the plaintiffs in *Austin* and *MCFL*. Accordingly, I find that the

[138] Future reviewing courts will not be writing on a blank slate. The Commission's regulations on the scope of the *QNC* exemption have been litigated multiple times. *See supra* note 135.

Wellstone Amendment does not render Title II substantially overbroad.[139]

d. *Conclusion Relating to Compelling Governmental Interests and Narrow Tailoring*

Based on the objective, empirical evidence, I conclude that BCRA is narrowly tailored to address the compelling governmental interests at stake in this case. As the Findings provide, Congress concluded that corporations and labor unions were using their general treasury funds to influence federal elections in violation of years of statutory prohibition. Title II of BCRA addresses the concern of Congress that corporations and labor unions were using their substantial aggregations of wealth to dominate the political environment. In that vein, Title II protects the individuals who have paid money into a corporation or union for purposes other than the support of candidate from having their money used to support political candidates to whom they may be opposed. Finally, Title II also addresses the potential for corruption that exists when corporations and labor unions make independent expenditures that have the potential to create political debts. *See Bellotti*, 435 U.S. at 788 n.26.

In addressing both forms of corruption, the primary definition of BCRA creates an objective test that identifies broadcast advertisements that influence a federal election.

[139] Judge Leon finds Title II of BCRA unconstitutional only insofar as it applies to *MCFL*-corporations. However, I cannot agree with his conclusion that Sections 203 and 204 are unconstitutional because they do not create a specific statutory carve-out for *MCFL* corporations. *MCFL* was an as-applied challenge, and the Supreme Court did not strike down all of FECA as a result of its decision. Rather, the *MCFL* exemption is litigated on a case-by-case basis. *See MCFL*, 479 U.S. at 271 (Rehnquist, C.J., concurring in part, dissenting in part) (foreshadowing that the result of the *MCFL* decision would be to spur "costly litigation"). Therefore, I do not find a constitutional defect in the fact that BCRA does not create a statutory carve-out for *MCFL* corporations.

BCRA focuses only on those broadcast advertisements that mention a federal candidate, which, as demonstrated, is a key determinant of issue advertising that is essentially designed to influence a federal election. In addition, BCRA only applies to broadcast advertisements which, while mentioning a candidate, are targeted to that candidate's electorate. Moreover, BCRA only applies to these advertisements when they appear within the thirty days of a candidate's primary election or sixty days of the date of a general election. Nor is BCRA overbroad because it applies to certain non-profit corporations. It is obvious that the Supreme Court's decision in *MCFL* means that BCRA cannot constitutionally be applied to certain nonprofit corporations and the Commission's regulations provide for this fact. Finally, BCRA does not prohibit corporations and labor unions from making advertisements meeting the aforementioned criteria. Rather, BCRA only requires that corporations and labor unions pay for these advertisements with funding that comes from those committed to the political ideals of the corporation and labor union; namely through PACs where disclosure is present and where contributors are aligned with the political message of the corporation or labor union.

In my view, Title II is narrowly tailored to serve these compelling governmental interests. The primary definition of electioneering communication purposefully creates a new objective test that draws a bright line between issue advocacy and electoral advocacy. At this facial challenge stage, I find that it is narrowly tailored to serve compelling governmental interests and therefore respectfully dissent from the conclusions reached by Judge Henderson and Judge Leon on this point.

F. *Plaintiffs' Underbreadth Challenge*

A number of Plaintiffs also argue that Title II of BCRA is unconstitutional because it is fatally underinclusive. *See, e.g.*, McConnell Br. at 75-77, 81; NRA Br. at 34-39; Chamber/

NAM Br. at 6. For example, Plaintiffs contend that Title II is underinclusive because it does not restrict broadcast advertisements outside the thirty and sixty-day windows. McConnell Br. at 75; NRA Br. at 37-38. The Plaintiffs also contend that BCRA is underinclusive because it does not apply to print advertisements, direct mail, and the Internet, McConnell Br. at 81; NRA Br. 33-37, and because it only applies to corporations and labor unions, NRA Br. at 38.[140]

Given our Circuit's decision in *Blount v. SEC*, I am not persuaded by Plaintiffs arguments on this score. The D.C. Circuit court in *Blount* stated:

> [A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does not require the government to curtail as much speech as may conceivably serve its goals. While the rule chosen must "fit" the asserted goals, *City of Cincinnati [v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993)], it must also, by virtue of the narrow tailoring requirement discussed below, strike an appropriate balance between achieving those goals and protecting constitutional rights. Because the primary purpose of underinclusiveness analysis is simply to "ensure that the proffered state interest actually underlies the law", *Austin*, 494 U.S. at 677 (Brennan, J., concurring), a rule is struck for underinclusiveness only if it cannot "fairly be said to advance any genuinely substantial governmental interest", *FCC v. League of Women Voters*, 468 U.S.

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[140] To the extent that the McConnell Plaintiffs argue in a brief footnote that Title II is under inclusive because it applies to advertisements that make only "passing" references to federal candidates, McConnell Br. at 77 n.37, Plaintiffs fail to state how it would be possible to create a restriction on electioneering communication that would be based on the length of time a reference to a federal candidate is mentioned. I simply do not find this argument persuasive.

364, 396 (1984), because it provides only "ineffective or remote" support for the asserted goals, *id.* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)), or "limited incremental" support, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983). *See also Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (government "must demonstrate its commitment to advancing [its] interest by applying its prohibition evenhandedly . . . . Without more careful and inclusive precautions against alternative forms of [the harm], we cannot conclude that Florida's selective ban . . . satisfactorily accomplishes its stated purpose."). Thus, with regard to First Amendment underinclusiveness analysis, neither a perfect nor even the best available fit between means and ends is required.

Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995) (emphasis and alterations in original). As concluded *supra*, there is a tight fit between the asserted compelling governmental interests and the statutory provisions in Title II.

Plaintiffs first complain that BCRA is underinclusive because it regulates only advertisements aired within 60 days of a general election or 30 days of a primary, as opposed to advertisements falling just outside those periods. McConnell Br. at 75-77; NRA Br. at 37-38. As extensively discussed *supra*, BCRA focuses on issue advertisements designed to influence a federal election. The law, therefore, regulates advertisements that only fall within periods before federal elections. On the basis of empirical data, Congress concluded that sixty days before a general election and thirty days before a primary election were the periods of time in which issue advertisements were being used most often to influence federal elections. While Plaintiffs expert, Dr. Milkis, observes that advertisements outside the thirty and sixty day period have some effect on federal elections, Findings ¶ 2.11.1, the Findings demonstrate that issue advertisements mentioning a federal candidate are most often aired in the sixty days before

a general election and the thirty days before a primary election. *See generally id.* ¶ 2.11. Congress recognized that most candidate- centered issue advertisements were run in close proximity to a federal election. *See supra* Findings ¶ ¶ 2.8.1.3, 2.8.2 (discussing the fact that candidate-centered issue advocacy is concentrated in the weeks surrounding federal elections). In my judgment, focusing on periods outside the sixty and thirty day windows would have rendered the primary definition fatally overbroad given the empirical evidence presented about the timing of candidate-centered issue advertisements. Accordingly, I find that Title II strikes an appropriate balance between achieving the compelling governmental interests and protecting constitutional rights.

Plaintiffs next challenge Title II as underinclusive on the ground that its definition of electioneering communication covers broadcast advertisements on television and radio, but not advertisements run in other media, such as print, direct mail, or the Internet. McConnell Br. at 81; NRA Br. at 33-36; *see also* Findings ¶ 2.10. As stated, however, by the AFL-CIO Plaintiffs, "broadcast is the most potent medium available in this electronic age, which is precisely why BCRA seeks to decisively impair groups' access to it. Print advertising, telephone banks, direct mail and other forms of non-broadcast communications pale in comparison as mass communications outlet." AFL-CIO Br. at 11. The Findings similarly conclude that broadcast advertising on television and radio are the most potent form of advertising. Findings ¶ ¶ 2.10.1-2.10.2.[141]

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[141] Plaintiffs' citation to *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), is misplaced. McConnell Br. at 76; NRA Br. at 33. In *Republican Party of Minnesota*, the Supreme Court struck down a state law that prohibited candidates for judicial office from announcing their views on disputed legal or political issues. The Court found the law to be underinclusive because it only prohibited a judge from announcing views on a disputed issue during the pendency of his or her candidacy.

I disagree with the NRA's conclusion that the other forms of media, like webcasts, telemarketing, direct mail, email, and print advertisements will logically become the next vehicle for corporations and labor unions looking to influence a federal election. In my view, the flaw with this argument lies in the assumption that these other media are just as effective as television and radio advertising for conveying an electioneering message. The evidence at this juncture does not support this conclusion. Therefore, I also respectfully disagree with Judge Henderson's conclusion on this matter.

The NRA, for example, contends that its webcasts of "NRA Live!" which often criticize politicians, are comparable to the NRA's issue advertising campaigns broadcast through radio or television. *See* NRA Br. at 36-37; Findings ¶ 2.10.3. The NRA's evidence in support of this assumption is not sufficient. First, the NRA offers a declaration of their communications consultant Angus McQueen who states that the Internet has become an "*increasingly* important part of how information becomes

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Republican Party of Minnesota, 122 S.Ct. at 2537 (observing that the day before an individual declares his or her candidacy and after he or she is elected are both periods where the statute did not apply). In the case of *Republican Party of Minnesota*, the Supreme Court concluded that if a judge's announcement of his or her legal views threatened his or her appearance of fairness, then that threat existed regardless of whether the announcement occurred during his or her campaign. *See id.* at 2537 (observing that "statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible"). Such is not the case with regard to the thirty and sixty day windows of BCRA. The evidence in this case demonstrates that broadcast issue advertisements airing outside the 30 and 60 day periods do not influence federal elections to anywhere near the same degree as those aired within the 30 and 60 day windows. Rather, it is in the immediate run-up to the federal election that issue advocacy is most often exploited for electioneering purposes. Congress was correct to focus on the problem and not attempt to prohibit more conduct than the record would support.

disseminated in our society." Findings ¶ 2.10.3.1 (emphasis added). However, congressional judgment regarding the "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *NRWC*, 459 U.S. at 209 (internal citation and quotation marks omitted). Merely because the Internet is "increasingly" part of how society receives and disseminates information does not make it comparable to broadcast advertisements over television and radio, which everyone acknowledges was the problem Congress sought to address with BCRA. The other evidence presented by the NRA is a submission of "NRA Live!" viewership statistics and various videotapes containing broadcasts of "NRA Live!." Findings ¶ 2.10.3.2. However, the NRA does not include any expert or other testimony that "NRA Live!" is influencing federal elections to the same degree as the NRA's broadcast advertising campaigns. It is likely that there is no evidence of such a phenomenon because in order to view "NRA Live!," individuals must "opt-in" by going to the NRA website and viewing the program. Those individuals choosing to do so are likely more predisposed to the NRA's views about political candidates than the undecided voter watching a sitcom on a Thursday evening and viewing a thirty-second issue advertisement critical of Al Gore. The risk of corrupting the political process is much more powerful in the latter example than in the former. I cannot agree that Title II is flawed because it did not extend BCRA's restrictions to the Internet.

I reach the same conclusion for direct mail and newspaper advertising. Although everyone agrees that direct mail can be "very effective," *Id.* ¶ 2.10.4 (Magleby), there is no evidence that direct mail has reached the degree of effectiveness as broadcast advertising. Until such a conclusion is reached by Congress, I find it appropriate that it did not extend the definition of electioneering communication to direct mail. In

regard to newspaper advertising, the NRA presents no testimony that newspaper advertising is as effective as broadcast radio and television advertising. As Denise Mitchell, Special Assistant for Public Affairs for AFL-CIO President John J. Sweeney, observes: "newspapers are a more passive medium, with less immediacy than broadcast, and are less likely to generate action, and it is far harder to convey in print the human, personal impact of legislative issues—a key part of our strategy and effectiveness." *Id.* ¶ 2.10.2 (a conclusion, I note, that is also applicable to direct mail). I agree and find the NRA's arguments regarding print media unpersuasive. To the extent that the NRA cites advertisements that are more expensive to run in newspapers than advertisements run on radio, NRA Br. at 35; Findings ¶ 2.10.5, the NRA misses the point; failing to provide a shred of evidence that the print medium has anywhere near the effect as the broadcast media for conveying electioneering messages. Even the NRA's own communication consultant concedes that "paid broadcast media" is the most powerful means of conveying the NRA's messages. Findings ¶ 2.10.2 (McQueen).

In the final analysis, Congress appropriately tailored the primary definition of electioneering communication to radio and television advertisements. *Id.* 2.10.6. The uncontroverted testimony of experts and political consultants is that broadcast advertising is the most effective form of communicating an electioneering message. *Id.* ¶ 2.10.1-2.10.2 (Magleby, Pennington). Even Plaintiff AFL-CIO concedes this point. AFL-CIO Br. at 11. The fact that Congress did not extend the prohibition on electioneering communication to non-broadcast advertisements does not render Title II unconstitutional as underinclusive under the First Amendment.

Plaintiffs also contend that because the restrictions in Title II only apply to corporations and labor unions, the law is underinclusive as it does not cover unincorporated entities

and wealthy individuals. NRA Br. at 38. Section 203 of BCRA amends 2 U.S.C. § 441b, a statute that has long regulated the activities of corporations and labor unions. The Supreme Court has already rejected a similar argument in a footnote to its *MCFL* decision:

> While business corporations may not represent the only organizations that pose this danger, they are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth. That Congress does not at present seek to regulate every possible type of firm fitting this description does not undermine its justification for regulating corporations. Rather, Congress' decision represents the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,'" to which we have said we owe considerable deference. *FEC v. National Right to Work Committee*, 459 U.S. 197, 209 (1982) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937)).

MCFL, 479 U.S. at 259 n.11. In *Austin*, the Supreme Court found that the state statute modeled after Section 441b, which did not apply to unincorporated associations or labor unions, was not underinclusive. *Austin*, 494 U.S. at 665. The Supreme Court in *Buckley* held that Congress had not assembled a record that would permit justifying restrictions on the independent expenditures of individuals, *see Buckley*, 424 U.S. at 46; Congress should not, therefore, be penalized for not limiting the amount that wealthy individuals can spend on electioneering communications by following the dictates of a Supreme Court decision. *See Austin*, 494 U.S. at 678 (Brennan, J., concurring) (statute not underinclusive because it adheres to Supreme Court precedent). Given the prior decisions of the Supreme Court, Plaintiffs' underbreadth challenge on this ground fails.

G. *Plaintiffs' Challenge Relating to Exemption for News Stories, Commentaries or Editorials from a Broadcast Station*

Finally, the NRA Plaintiffs[142] argue that the exemption in Title II of BCRA for news stories, commentaries, or editorials-the "media exemption"—violates the Equal Protection Clause and the First Amendment in that it is underinclusive. NRA Br. at 42.[143] As discussed, *supra,* BCRA, like FECA, exempts certain communications distributed through the facilities of a broadcasting station from regulation. BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B) ("a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate" is not included in the definition of electioneering communication).

In my view, the Supreme Court foreclosed consideration of this issue with its decision in *Austin* and the evidence that the NRA has put forward is not sufficient to alter the conclusion reached in that case. In *Austin,* the Supreme Court found that the Michigan statute's exemption of media corporations from its expenditure restriction did not render the statute

[142] The Paul Plaintiffs also raise this claim. The Paul Plaintiffs argument is discussed in the *per curiam* opinion.

[143] I disagree with the NRA's argument that the media exemption demonstrates that BCRA is, in essence, a regulation of television programming. *See* NRA Br. at 47. BCRA, in my judgment, is not akin to regulations that burden the editorial discretion of TV companies by requiring them to carry certain programming content. Again, BCRA does not prohibit speech. The NRA is free to run electioneering communications, provided they are paid for with segregated funds. As Defendants correctly observe, "The amount the NRA can spend on such ads is limited only by the willingness of its millions of individual members to contribute to the NRA's separate segregated fund, which in 2000 spent $17 million to influence federal elections." Gov't Opp'n at 104. I therefore find the NRA's argument on this score unpersuasive.

unconstitutional. *Austin,* 494 U.S. at 666-67 (noting that the "media exception" in the Michigan statute excluded from the definition of expenditure any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting") (citation and footnote observing that the Michigan exemption was similar to the exemption in FECA both omitted). The Supreme Court concluded that the media exemption was bound to impose fewer restrictions on the expression of corporations that are in the media business and therefore needed to be justified by a compelling state purpose. The Supreme Court held:

> Although all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Bellotti,* 435 U.S. at 781. *See also Mills v. Alabama,* 384 U.S. 214,219 (1966) ("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"). The Act's definition of "expenditure," [citation omitted] conceivably could be interpreted to encompass election- related news stories and editorials. The Act's restriction on independent expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about,

> newsworthy events . . . . A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, *Bellotti, supra,* 435 U.S. at 782, and n.18, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

Austin, 494 U.S. at 667-68.

The NRA argues that the decision in *Austin* on this point was somehow a "close call" and questions whether *Austin* "was correctly decided." NRA Br. at 48. The NRA argues that "the emergence of the internet and the absorption of the broadcast networks by non-media conglomerates" change the role of media corporations in society. *Id.* at 42. According to the NRA, since *Austin* was decided in 1990, there has been such a seismic shift in the structure of the media industry that *Austin* is no longer relevant.

The NRA argues that the emergence of the Internet and the absorption of broadcast networks by nonmedia companies have altered the nature of traditional companies and therefore render Title II facially unconstitutional. NRA Br. at 42. I have discussed the problems with the NRA's Internet arguments, *supra*. With regard to the NRA's arguments about nonmedia companies purchasing media companies, the NRA's entire line of argument ignores the fact that the media exception only applies to the "facilities of any broadcasting *station*," BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B) (emphasis added), not the facilities of any broadcasting *company*. The NRA provides *no* evidence that the purchase of media corporations by other businesses has any impact on any "news story, commentary, or editorial distributed through the facilities of any broadcasting station."

BCRA § 201(a); FECA § 304(f)(3)(B); 2 U.S.C. § 434(f)(3)(B).[144] Furthermore, it is not the role of a district court, in my judgment, to question a binding decision of the United States Supreme Court, particularly when the proffered evidence amounts to no more than a disagreement with the *Austin* result.

Given that the NRA's evidence relating to the media exemption is entirely lacking, there is no reason to engage in a further discussion of their argument. The equal protection argument was settled in *Austin,* and for the same reasons announced in that decision, I find that the NRA's underinclusiveness argument is also without merit. Simply put, *Austin* is controlling.

H. *Conclusion Regarding Title II*

I have considered and rejected Plaintiffs' other arguments made to the three- judge District Court and conclude that the restrictions on electioneering communication, as defined in the primary definition, are facially constitutional. In making this decision, I am extremely cognizant of how rare it is for a decision to uphold a content-based restriction on speech. Nevertheless, in finding these provisions in Title II constitutional I am motivated primarily by the record assembled in this case and the history of government regulation of corporations and labor unions in the context of federal elections.

In this case, the facts tell the story. The record convincingly demonstrates that corporations and labor unions use general treasury funds to influence federal elections in direct violation of years of federal policy. I am not convinced that Congress is powerless to act to channel the corporate and labor union presence in federal elections through PACs where

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[144] Moreover, as the NRA points out in its brief, NBC was acquired in 1985 by General Electric, a move which *predated* the *Austin* Court's decision. NRA Br. at 44 n.31.

disclosure is present and where contributors are aligned with the political message of the corporation or labor union. The express advocacy test, in my view, is not a constitutional requirement; what is required is an objective, bright-line rule that constitutionally distinguishes between issue advocacy and advocacy intended to influence a federal election.

With the primary definition of electioneering communication, Congress fashioned a test that includes all of the major characteristics of issue advertising designed to influence a federal election: broadcast advertisements, aired in close proximity to a federal election, referring to a federal candidate, and targeted to that candidate's electorate. In Congress's judgment, these advertisements influence federal elections in the overwhelming majority of cases, despite Plaintiffs' self-serving testimony in this case which, in many instances, is belied by prior written statements and documentary evidence. In this facial challenge, on the basis of the record assembled, and on the basis of the longstanding history of congressional regulation of corporate and labor union involvement with federal elections, I find that Congress's decision to prohibit corporate and labor union spending on electioneering communications with general treasury funds is one that meets the standard of strict scrutiny.

By enacting Title II, Congress recognized the paramount importance of having legislation that controls electioneering communication and of preventing corporations and labor unions from using general treasury funds to influence federal elections. After reviewing the law under strict scrutiny review, I have found the primary definition of electioneering communication constitutional. Given the importance of this issue to Congress—*as demonstrated by their enacting a backup definition to ensure that electioneering communications would be regulated even in the event the primary definition is found unconstitutional*-I join, in the alternative, Judge Leon's opinion regarding the constitu-

tionality of the backup definition of electioneering communication. Nevertheless, as my opinion makes plain, I strongly believe that the primary definition is fully consistent with the Constitution, and but for the position of the other judge's on this three-judge District Court, would not reach the backup definition.

Section 213

The only remaining provision of Title II that has not been addressed in my opinion or the *per curiam* opinion, is Section 213 of BCRA. For the reasons stated in Judge Leon's opinion, I agree that Section 213 is unconstitutional. While the record is replete with evidence related to the close nexus between parties and candidates in the fundraising process, there is no evidence to demonstrate that a political party's expenditures after nominating its candidate are always coordinated. *See* 148 Cong. Rec. S2144 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain) ("We believe that once a candidate has been nominated a party cannot coordinate with a candidate and be independent in the same election campaign."). *Colorado I* disproves this notion, and Defendants have put forward no additional evidence to demonstrate that there are any special corruption problems with having political parties make independent expenditures on behalf of their candidates. *Colorado I*, 518 U.S. at 618 ("The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures."). Given the record in this case, I must concur with Judge Leon in finding Section 213 unconstitutional.

II. TITLE I: REDUCTION OF SPECIAL INTEREST INFLUENCE

Section 101: Soft Money of Political Parties

The McConnell, RNC, CDP, and Thompson[145] Plaintiffs all present a variety of constitutional challenges to Title I of BCRA, premised on the First, Fifth, and Tenth Amendments of the Constitution. After reviewing the record in this case, the governing caselaw, and the parties' lengthybriefing, I find that Plaintiffs' arguments lack merit and that Title I of BCRA is constitutional.[146]

For well over two decades, the Commission has sought to regulate the use of nonfederal funds by permitting the national, state, and local political party committees to allocate

[145] In regard to Title I, the Thompson Plaintiffs, in their briefing, initially presented only an equal protection argument. Thompson Br. at vii; Thompson Opp'n at 1. I concur entirely in Judge Henderson's discussion of the Thompson Plaintiffs' equal protection claim. Henderson Op. at Part IV.D.4. To the extent the Thompson Plaintiffs have attempted to argue a First Amendment claim, the tenor of their argument is that candidates from economically disadvantaged areas need to be able to raise soft money to be competitive. Thompson Reply at 7. First, candidates have never been able to directly raise or spend soft money, so to the extent the Thompson Plaintiffs claim they are deprived of an effective tool of financing, it only further convinces me of the extent to which federal candidates have become dependent on nonfederal funds. Second, the Thompson Plaintiffs' argument is essentially a policy-based argument, better suited for the legislature than this three-judge District Court panel. It has long been held that Congress has broad authority to set contribution limitation amounts. *See, e.g., Nixon v. Shrink Missouri Government PAC* ("*Shrink Missouri* "), 528 U.S. 377, 395-97 (2000). Finally, to the extent it is possible, I subsume the Thompson Plaintiffs' general First Amendment claims into the rest of my discussion on the First Amendment.

[146] Plaintiffs take a scattershot approach in regard to their Title I arguments, and although I have considered all of their arguments, in the interest of both space and time, I address only the ones I have determined are the most salient. The arguments not addressed specifically lack merit.

expenses on "nonfederal" activities between their federal and nonfederal accounts. The vast record in this case demonstrates that this system-a cobbled-together aggregation of FEC regulations and advisory opinions-is in utter disarray with all of the different political party units spending nonfederal money to influence *federal* elections. Congress was correct in finding that in many instances, the allocation regime was a failure. The only way to return the system to the original design of FECA was to prevent the national party committees from raising money outside of the restrictions in FECA and to restrict the use of nonfederal funds by the state and local party committees for "Federal election activity." Seen from this perspective, Title I is not a draconian realignment of the role of political parties. *See, e.g.*, RNC Br. at 42. Rather, Title I operates as a fundraising restriction aimed at restructuring the failed allocation regime that has produced a campaign finance system so riddled with loopholes as to be rendered ineffective. Concomitantly, BCRA restores in large measure, the federal campaign finance structure that had functioned effectively prior to the rise of seductive "soft money."

In other words, Congress created Title I of BCRA to fix the contribution limitations of FECA that have fallen into severe disrepair, largely as a result of these aforementioned regulations and advisory opinions. Title I accomplishes this goal by requiring the national committees of the political parties to fund their operations with federally regulated money. Equally important, the law also compels the state and local committees of the national political parties to fund their Federal election activities with money raised in compliance with federal law. Other provisions in Title I are designed to ensure the integrity of Title I, by including restrictions on the ability of the committees of the national parties and their agents to raise money for certain tax-exempt organizations and by placing limitations on federal and state candidates in regard to certain campaign and fundraising activities. At the

same time, BCRA raises the limitations on "hard money" contributions to the national, state, and local party committees to facilitate raising funds within this new statutory framework.

When stripped of Plaintiffs' gloss, it becomes evident that Title I basically operates as a contribution limitation on political party fundraising, amply supported by prior Supreme Court caselaw and the immense record in this case. Given the sufficiently important governmental interests long identified by the Supreme Court to support the contribution restrictions like those at issue in Title I, Congress rightfully concluded that the only way to combat the problems related to the abusive use of nonfederal funds was to: (a) limit the funding of national committees of the political parties to money regulated by the federal government, and (b) enact a series of limited, ancillary, prophylactic measures involving state and local committees and candidates to ensure the integrity of the national committee nonfederal funds prohibition. In my judgment, Title I is constitutional.

My opinion presents a concurrence in part and a dissent in part. I concur with Judge Leon's view that in undertaking a First Amendment analysis of Title I, the relevant standard of review is the scrutiny that the *Buckley* Court applied to contribution restrictions, that the limitation in Section 323(b) on state parties' activities described in Section 301(20)(A)(iii) is constitutional, and that the restrictions on state candidates in Section 323(f) is constitutional. I also concur in the judgment of Judge Henderson that Section 323(e) is constitutional. My opinion begins with a brief discussion of the rise of nonfederal money as a tool of national party financing for federal election purposes. Given that the conclusions reached by Judge Henderson and Judge Leon turn primarily on Plaintiffs' First Amendment challenges, I next discuss those arguments, and provide the reasoning for my dissent on the remaining issues. Finally, I provide my

reasons for rejecting Plaintiffs' Fifth Amendment arguments and for finding that Plaintiffs lack standing to assert a challenge under the Tenth Amendment to Title I.

A. *Background: The Rise of Nonfederal Money as a Means of Financing Federal Elections*

As discussed at length in the *per curiam* opinion, Title I was enacted by Congress to combat the growing problem of the national committees of the political parties raising funds outside of the source and amount restrictions in FECA and using that money to influence federal elections. In creating Title I, Congress attempted to shore-up the decades-old contribution restrictions in FECA, which had been eroded as a result of a series of FEC rulemaking and advisory opinions which established an allocation system. To accomplish this goal, Congress eschewed the failed system of allocation percentages and prohibited national political party committees from raising money that is not subject to federal source and amount limitations.

The 1974 Amendments to FECA placed limitations on the source and the amount of contributions to federal candidates and political parties. The law prohibited corporations and labor unions from making contributions to political parties and federal candidates. 2 U.S.C. § 441b(a). FECA also limited an individual's contributions to $1,000 per election to a federal candidate, $20,000 per year to national political party committees, and $5,000 per year to any other political committee such as a political action committee ("PAC") or a state party committee. 2 U.S.C. § 441a(a)(1). Individuals were likewise subject to an overall annual limitation of $25,000 in total contributions. 2 U.S.C. § 441a(a)(3).[147] These

[147] Under BCRA, the contribution limits have been raised. BCRA § 307(a); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(A)-(B) (increasing limit on contributions to candidates and candidates' committees from $1,000 to $2,000 for individuals, and increasing the limit on individual

limitations have been consistently upheld by the Supreme Court. *Buckley*, 424 U.S. at 23-38; *NRWC*, 459 U.S. at 207-10. The definitions of contribution and expenditure in FECA were then, and remain now, limited to the donation or use of money or anything of value "for the purpose of influencing an election for Federal office." 2 U.S.C. § 431(8)(A)(i),(9)(A)(i). The statute was therefore silent on how to draw lines around money raised outside of FECA's source and amount limitations for political parties to spend on activities that were expected not to be used for the purpose of influencing a federal election.

As has been set out in much greater detail in the *per curiam* opinion, the FEC's opinions and rulemakings drew that line by permitting state and national political party committees to pay for the nonfederal portion of their administrative costs and voter registration and turnout programs with monies raised under relevant state laws (not FECA), even if they permitted contributions from sources such as corporations and labor unions that were prohibited under FECA. As a result, national and state political parties began to raise so-called "soft money," which described these nonfederal funds-not subject to FECA limits and restrictions-to pay for a share of election-related activities that influenced federal elections.

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contributions to national political party committees from $20,000 to $25,000); BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D) (increasing limit on contributions to state political party committees from $5,000 to $10,000); BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3) (increasing aggregate limit on individual contributions from $25,000 per year to $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates); BCRA § 307(c); FECA § 315(h); 2 U.S.C. § 441a(h) (increasing limit on contributions by the Republican or Democratic Senatorial Campaign Committees from $17,500 to $35,000). Moreover, many of these contribution limits are to be increased annually to account for inflation as reflected in changes to the consumer price index. BCRA § 307(d); FECA § 315(c); 2 U.S.C. § 441a(c).

Generally, the state political parties' allocation rate was substantially lower than the national party allocation rate. The rules, therefore, furnished national political parties with an incentive to channel many of these expenditures through state political party committees, since this approach allowed a higher proportion of the parties' expenses to be paid for with nonfederal funds which were much easier to raise than those funds raised subject to FECA's restrictions.

During the 1980 election cycle, the RNC spent approximately $15 million in nonfederal funds and the DNC spent roughly $4 million, constituting nine percent of the national political parties' total spending. Findings ¶ 1.3. In 1984, the national political parties spent, collectively, approximately $21.6 million in nonfederal funds, which accounted for five percent of their total spending. *Id.* By 1988, national party nonfederal funds increased to $45 million or eleven percent of national party spending. *Id.* In 1992, nonfederal fundraising by the national parties reached $86.1 million, and nonfederal funds were used for sixteen percent of the national parties' spending. *Id.* ¶ 1.4, 1.4.1. With the 1996 election cycle, the national parties raised *$263.5 million* in nonfederal funds and nonfederal money spending constituted approximately thirty percent of the national party committees' total spending. *Id.*

The uncontroverted record demonstrates that in 1996 the dramatic rise in spending of nonfederal funds by national political parties was tied to the development of issue advocacy media campaigns. Originated by President William Clinton's political consultant Dick Morris, the move was eventually copied by the Republican Party. *Id.* ¶ ¶ 1.6, 1.7. Morris used nonfederal funds to pay for advertisements that either promoted President Clinton by name or criticized his opponent by name, while avoiding words that expressly advocated either candidate's election or defeat. *Id.* 1.6. While these advertisements prominently featured the President, none

of the costs associated with these advertisements were charged as coordinated expenditures on behalf of President Clinton's campaign, subject to the FECA's contribution limits. *Id.* Rather, the political party paid the entire cost, with a mix of federal and nonfederal funds, arguing that political party communications that did not use explicit words advocating the election or defeat of a federal candidate could be treated like generic party advertising (that is, "Vote Republican!") and financed, according to the FEC allocation rules, with a mix of federal and nonfederal funds.[148] *Id.* In many cases, the national political party committees used the state political party committees as vehicles for implementing the issue advocacy campaign because the allocation rules were much more favorable for state parties, and consequently, the advertisements could be financed with nonfederal funds. *See, e.g., id.* ¶¶ 1.26.1, 1.26.2, 1.26.6. This approach later spread to Congressional campaigns. *Id.* ¶ 1.8.

Political parties were now able to pay for such "issue advertisements" with a mix of federal and nonfederal funds because the FEC treated these advertisements as "generic" party advertisements. In order to fund these "generic" party advertisements or "issue advertisements," the political parties needed to raise an increasing amount of nonfederal money. With this strategy firmly in place, the national political parties spent $221 million in nonfederal funds on the 1998 midterm elections, or 34 percent of their total spending, which was more than double the amount of nonfederal funds spent

[148] As discussed in the *per curiam* opinion, the FEC had ruled that party committees could sponsor issue advocacy advertisements that did not feature a federal candidate and pay for these advertisements with a combination of hard and soft dollars as permitted under the allocation regulations. Federal Election Commission Advisory Opinion 1995-25 (discussing that allocation rules were permissible to allocate funding for "RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform").

during the previous midterm elections. *Id.* ¶ 1.4.2. With the 2000 elections, spending of nonfederal funds by the national political parties reached $498 million, which was now 42 percent of their total spending. *Id.* 1.4.3. The top 50 non-federal fund donors during the 2000 election cycle each contributed between $955,695 and $5,949,000. *Id.* During the first 18 months of the 2001- 2002 election cycle, the political parties reported non-federal receipts of $308.2 million, which is a 21 percent increase over the same period during the 1999-2000 cycle. *Id.* ¶ 1.4.4. The FEC notes that this increase is "all the more significant given that typically parties raise more in Presidential campaign cycles than in non-presidential campaigns." *Id.*

It was in response to its view that the use of "soft money" was a problem that Congress enacted Title I of BCRA. *See, e.g., Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167, at 4468 (1998) ("Thompson Committee Report") at 4468 (majority report) ("soft money spending by political party committees eviscerates the ability of FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates"); *id.* at 4565 (minority report) ("Together, the soft-money and issue advocacy loopholes have eviscerated the contribution limits and disclosure requirements in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system."). The original design of the FEC's rules on allocation were to permit the political parties the opportunity to raise nonfederal funds for purposes unrelated to federal elections. The parties were permitted to pay for the nonfederal portion of their expenses with nonfederal funds. Over time, however, what started out as a fairly simplistic approach to cost allocation (nonfederal portions of administrative and get-out-the-vote ("GOTV") activities could be paid for with nonfederal funds), turned into a gaping loophole, which permitted the national political parties to

raise enormous sums of money to spend on federal elections-all outside FECA's source and amount limitations. In essence, the actions by the political parties at all levels disproved the assumption that voter registration activity, voter identification, generic campaign activity, and get-out-the-vote activity in relation to a federal election could be allocated between nonfederal and federal accounts without inviting the political parties to circumvent FECA's carefully constructed contribution system and without creating anew the same problems of corruption identified in *Buckley* involving unlimited individual contributions. The parties' actions confirmed the Supreme Court's observation in *Colorado II*, that "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and *parties* test the limits of the current law . . . ." *Colorado II*, 533 U.S. at 457 (emphasis added).

Prior to BCRA, the contribution regime carefully constructed in FECA, and upheld in *Buckley*, had become nothing more than an elaborate fiction with the national political parties and their state counterparts circumventing the restrictions with ease. Prior to BCRA, federal candidates and officeholders, in conjunction with their political party committees, raised large amounts of nonfederal money for purposes directly related to federal elections. Beginning with issue advocacy strategy employed for the election campaign of President William Clinton in 1996, the system took a turn for the worse as the political parties scrambled to collect as much "soft money" as possible to fund "issue advertisements" that were nothing short of campaign commercials in disguise. While loudly complaining about the other side's tactics, neither side was willing to unilaterally disarm, and the pressure to raise more and more money outside the system became increasingly intense, as the political party committee receipts clearly demonstrate. In the face of what can only be described as FEC lassitude to these problems, the political branches, after years of deliberation

and consensus, passed Title I to tackle the threat posed by nonfederal funds. Having set forth these preliminary observations to provide context for my opinion, I now turn to Plaintiffs' various constitutional challenges to Title I and explain why I have concluded that these arguments lack merit. In engaging in the following analysis, I shall discuss the extensive record established in this case, which demonstrates that Title I is a prophylactic measure aimed both at the corruption or the appearance of corruption associated with nonfederal funds and at the evasion of FECA's source and amount limitations.

B. *Plaintiffs' First Amendment Challenges* [149]

1. *Standard of Review*

Unlike the electioneering communication provisions in Title II, the litigants contest the level of scrutiny that should control the Court's review of Title I for First Amendment purposes. Plaintiffs contend that the restrictions in Title I merit review under the lens of strict scrutiny, *see, e.g.*, McConnell Br. at 31-34; RNC Br. at 37-44, while Defendants argue that the provisions in Title I should be analyzed under the "closely drawn" scrutiny that the *Buckley* Court applied to contribution restrictions, *see, e.g.*, Def. Opp'n at 3-4; Def.-Int. Opp'n at 17-23. In my judgment, Title I is a fundraising restriction that merits review entirely under *Buckley*'s "closely drawn" scrutiny applicable for contribution limitations.

Plaintiffs are mistaken when they argue that the restrictions in Title I partly impose an expenditure cap and, therefore, Title I requires strict scrutiny. McConnell Br. at 33; RNC Br. 51-53. Title I does not in any way limit political party committee spending on *any* activity. These restrictions only

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[149] I consider Plaintiffs' First Amendment underbreadth challenge as part of my analysis of their Equal Protection challenge, discussed *infra*.

indirectly affect expenditures by placing limitations on the source and amount of funds available for the party committees to use in order to make independent expenditures. Accordingly, the scrutiny applicable to contribution restrictions is appropriate for Title I.

Plaintiffs also urge this three-judge panel to apply strict scrutiny because Title I includes restrictions on the solicitation of nonfederal funds. I disagree with this theory as well. From a functional perspective, Title I presents a comprehensive contribution restriction that merits the scrutiny that *Buckley* applied to contribution restrictions. The Supreme Court in *Colorado II*, found that FECA presents "a functional, not formal, definition of 'contribution,'" because it included within the definition of contribution "coordinated expenditures." *Colorado II*, 533 U.S. at 438. According to the Supreme Court in *Colorado II*, the *Buckley* Court acknowledged Congress's functional classification, and "observed that treating coordinated expenditures as contributions 'prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.'" *Colorado II*, 533 U.S. at 443 (quoting *Buckley*, 424 U.S. at 47) (also noting that *Buckley* "enhanced the significance of this functional treatment by striking down independent expenditure limits on First Amendment grounds while upholding limitations on contributions (by individuals and nonparty groups), as defined to include coordinated expenditures").

A functional view of BCRA's solicitation restrictions demonstrates that they are designed to counter potential evasion of contribution restrictions. As is discussed *infra*, the record in this case is replete with incidents where the solicitation of nonfederal donations by party officials and candidates threatens the integrity of FECA's contribution restrictions. Hence, like the expenditure limitations discussed in *Colorado II*, which are aimed at preventing attempts to

circumvent FECA's contribution regime, BCRA's solicitation provisions are also designed to ensure the integrity of FECA's contribution limitations and not limit speech. Title I in its entirety, therefore, is properly considered within *Buckley*'s contribution framework and is reviewed under the scrutiny set out in *Buckley* applicable to contribution restrictions. *See also NRWC*, 459 U.S. at 210-11 (upholding restriction limiting a corporation's solicitation of contributions to corporation's PAC to members of the corporation on the basis of compelling governmental interests supporting the overall ban on corporate contributions to candidates).

Accordingly, I agree entirely with Judge Leon's discussion in his opinion that the three-judge District Court's analysis of the provisions in Title I merits review under the "closely" drawn scrutiny that the *Buckley* Court applied to contribution limitations and not strict scrutiny, and I concur in that portion of his opinion. We both agree that the restrictions will be upheld in Title I, if the Government demonstrates that the provisions in Title I are "closely drawn" to match a "sufficiently important interest." *Buckley*, 424 U.S. at 25; *see also Shrink Missouri*, 528 U.S. at 387-88.[150] With that standard in mind, I now turn to the sections of Title I and my analysis of whether these contribution restrictions are constitutional.[151]

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[150] Like Judge Leon, I observe that if the contribution limitations in Title I survive a claim that it infringes associational rights, then it also survives a speech challenge under the First Amendment. *Shrink Missouri*, 528 U.S. at 388; *see also id.* at n.3 (observing that contribution standard of review likewise addresses the "correlative overbreadth challenge").

[151] I also do not conclude that *Buckley*'s contribution- expenditure dichotomy is irrelevant to our review. McConnell Br. at 33 (stating that the "contributions-versus expenditures dichotomy of *Buckley* does not directly apply"). Plaintiffs assert that the reason for not applying *Buckley* is because Title I "effectively regulates the *uses* for which money is raised

2. *Title I is Constitutional Under the First Amendment*

In my judgment, this three-judge District Court need not go further than *Buckley* to uphold Title I from attack under the First Amendment. It is clear that *Buckley* provides sufficient flexibility for Congress to have enacted Title I in order to address the problems associated with political parties using nonfederal funds to influence federal elections. *See Shrink Missouri*, 528 U.S. at 404 (Breyer, J., concurring) ("*Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'"). The primary justifications for Title I are neither original nor unprecedented.

(a) Title I Serves The Same Sufficiently Important Interests Identified in Buckley and its Progeny

Title I was enacted to fulfill the same interests in "preventing corruption or the appearance of corruption" that the *Buckley* Court had found to support FECA's limitations on contributions.[152] The *Buckley* Court held that FECA's contribution limitations served the sufficiently important interests of "the prevention of corruption and the appearance of corruption spawned by the real or imagined *coercive influence* of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25 (emphasis added). Moreover, under the rubric

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and spent." McConnell Br. at 33 (emphasis in original). The problem with this argument is that *all* contribution limitations "effectively regulate" the uses for which money is raised and spent. *See* Tr. at 92 ("All contribution limits have [an] indirect effect on expenditures.") (Bader). Accordingly, this argument fails to convince me that the contribution-expenditure distinction is inapplicable to the restrictions at issue in Title I.

[152] *See NCPAC*, 470 U.S. 480, 496-97 (1985) (observing that *Buckley* and *Citizens Against Rent Control* held that these rationales "are the only legitimate and compelling government interests thus far identified for restricting campaign finances").

of "preventing corruption or the appearance of corruption," the Supreme Court has also permitted Congress to enact contribution limitations that serve to "prevent evasion" of the individual financial contribution limitations already found constitutional by the Supreme Court. *Id.* at 38; *see also Colorado II*, 533 U.S. at 456 (observing that "all members of the [Supreme] Court agree that circumvention is a valid theory of corruption.").

Since *Buckley*, the Supreme Court has consistently reaffirmed the notion of Congress's ability to create reasonable contribution restrictions to stem the tide of corruption and the appearance of corruption that exists in a regime of private candidate financing. *See Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley* ("*Citizens Against Rent Control*"), 454 U.S. 290, 296-97 (1981) ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* .... "); *California Med. Ass'n. v. FEC*, ("*California Med. Ass'n.*") 453 U.S. 182, 194-195 (1981) (noting that *Buckley* held that contribution limits "served the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained"); *see also Bellotti*, 435 U.S. at 788 n.26 ("The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted.") (internal citation omitted). Hence, the interests behind the restrictions on political party nonfederal funds have long had support in the Supreme Court's campaign finance jurisprudence.

In this case, Congress concluded that donations of nonfederal money to the political party committees had the same "coercive influence" on "candidates' positions and on their actions if elected to office" as the large contributions to candidates permitted prior to the enactment of the individual contribution limitations in 1974. *Buckley*, 424 U.S. at 25. Congress also concluded that the individual contribution limitations were being circumvented by political party committees at all levels who raised nonfederal funds and then spent those funds for federal election purposes.

In advancing these long upheld rationales to support the provisions in Title I of BCRA, I find that the evidence presented by Defendants to support these justifications is more than sufficient. As the Supreme Court observed in *Shrink Missouri*: "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. Given the Supreme Court's discussion of contribution restrictions beginning with *Buckley*, I find that Defendants do not break from well-established precedent in offering support for Title I because *Buckley* has already established that Congress may legislate: (a) to prevent corruption or the appearance of corruption inherent in the process of raising large monetary contributions; and (b) to prevent circumvention of the valid contribution limitations. As I demonstrate *infra*, the record before this three-judge District Court is *overwhelming* and amply supports both of the asserted rationales. With the foregoing in mind, I shall now briefly describe these interests and the evidence supporting them.

(i) The *Buckley* Court's Explanation of "Prevention of Corruption"

Given that there is such disagreement in the briefing as to what the Supreme Court meant by "prevention of corruption," it is important to take stock of how the *Buckley* Court used

that phrase and the evidence it relied on to find that Congress was justified in enacting FECA's contribution restrictions. As the Supreme Court in *Buckley* held:

> It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. *Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign.* The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given *to secure a political quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. *Although the scope of such pernicious practices can never be reliably ascertained,* the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Buckley, 424 U.S. at 26-27 (footnote omitted) (emphasis added). As this passage illustrates, the *Buckley* Court understood "corruption" as something intrinsic to the fundraising process of large contributions in a "system of private financing of elections." *Id.* at 26. The Supreme Court's rationale was grounded in the realistic and pragmatic understanding that "large contributions are given to secure a political *quid pro quo;*" *Id.* at 26; *see also id.* at 27 (referring to "political *quid pro quo*" as the "*danger* of actual *quid pro quo* arrangements") (emphasis added). Indeed, in introducing the primary interest behind the individual contribution limitations, the Supreme Court stated that the primary interest

in FECA's contribution limitations "is the prevention of corruption and the appearance of corruption spawned by the real or imagined *coercive influence* of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25 (emphasis added). Simply put, *Buckley* equates corruption with the fundraising process where access to elected officials and candidates is provided in exchange for large contributions.[153]

This point is underscored by the evidence relied on in the *Buckley* opinion to support the Supreme Court's discussion of the government's interest in preventing corruption. *See id.* at 27 n.28 (citing evidence from the Court of Appeals opinion in *Buckley* that relates to access provided to donors who contribute large sums of money). That the *Buckley* Court referred to the record from the Court of Appeals opinion deserves repeating here because it demonstrates that in upholding the individual contribution limitations in FECA, the "corruption" that concerned the *Buckley* Court was the *access* to federal candidates that large contributors receive. As the Court of Appeals found:

> Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, *in order to gain a meeting* with White House officials on price supports. The industry pledged $2,000,000 to the 1972 campaign, a pledge known to various White House officials, with President Nixon informed directly by Charles Colson in September 1970, as acknowledged by the 1974 White House paper.

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[153] Given *Buckley* 's teaching on constitutional analysis of contribution restrictions, I cannot agree with Judge Leon's theory that a reviewing court should focus its analysis on whether the *use* for which a contribution is put is corrupting. *See generally* Leon Op. *Buckley* and its progeny all instruct that the fundraising process is the focal point of the contribution restriction analysis, as my discussion in this section illustrates.

Since the milk producers, on legal advice, worked on a $2500 limit per committee, they evolved a procedure, after consultation in November 1970 with Nixon fund raisers, to break down the $2 million into numerous smaller contributions to hundreds of committees in various states which could then hold the money for the President's reelection campaign, so as to permit the producers to meet independent reporting requirements without disclosure. On March 23, 1971, after a meeting with dairy organization representatives, President Nixon decided to overrule the decision of the Secretary of Agriculture and to increase price supports. In the meetings and calls that immediately followed the internal White House discussion and preceded the public announcement two days later, culminating in a meeting held by Herbert Kalmbach at the direction of John Ehrlichman, the dairymen were informed of the likelihood of an imminent increase and of the desire that they reaffirm their $2 million pledge.

> *It is not material, for present purposes, to review the extended discussion in the Final Report on the controverted issue of whether the President's decision was in fact, or was represented to be, conditioned upon or "linked" to the reaffirmation of the pledge.*

Buckley, 519 F.2d at 839 n.36 (emphasis added) (internal citations omitted) (cited in *Buckley*, 424 U.S. at 27 n.28). The Circuit Court in *Buckley*, as affirmed by the Supreme Court, found that it was unnecessary to review the disputed issue of whether President Nixon's decision on price supports was actually changed by the $2,000,000 contribution. Instead, the Supreme Court found it sufficient that the dairy farmers were given access to the President and his officials in exchange for a sizable contribution. The corruption, thus, was associated with the fact that the donation was given "in order to gain a meeting with White House officials on price supports." *Id.*

This conclusion is further borne out by other evidence discussed in the Court of Appeals opinion and cited by the Supreme Court:

> The findings document lavish contributions by groups or individuals with special interests to legislators from both parties, e.g., by the American Dental Association to incumbent Congressmen in California; by H. Ross Perot, whose company supplies data processing for medicare and medicaid programs, to members of the House Ways and Means and Senate Finance Committees, and the House Appropriations Subcommittee for HEW.
>
> The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary as a "*calling card, something that would get us in the door and make our point of view heard,*" or "*in response to pressure for fear of a competitive disadvantage that might result.*" The record before Congress was replete with specific examples of improper attempts to *obtain governmental favor* in return for large campaign contributions.

Buckley, 519 F.2d at 839 n.37 (emphasis added) (internal citations omitted) (cited in *Buckley*, 424 U.S. at 27); *see also id.* n.38 (discussing evidence relating to large contributions given in exchange for ambassadorships).[154] The *Buckley*

[154] The evidence in the Court of Appeals opinion relating to giving ambassadorships in exchange for large donations discusses the conviction of one fundraiser under 18 U.S.C. § 600 for having promised a current Ambassador a more prestigious post in return for a $100,000 contribution to be split between Senate candidates designated by the White House and the 1972 campaign. *Buckley*, 519 F.2d at 840 n.38. Notably, the conviction did not involve a federal candidate or officeholder and therefore does not stand for the premise that, in citing this evidence, the Supreme Court requires evidence of bribery to support a contribution restriction. The point was only made to demonstrate that "while the appointment of large contributors [to ambassadorships] is not novel," *id.*, the activity surrounding ambassadorships and the 1972 election "made the

Court, therefore, realized the problems that inhere in a "system of private financing of elections," where contributors who donate large sums of money are given access to officeholders. *Buckley*, 424 U.S. at 26. In making this point, the Supreme Court eschewed relying on evidence that the contribution was connected to the decision-making of the federal official, *Buckley*, 424 U.S. at 27 n.28 (citing *Buckley*, 519 F.2d at 839 n.36) (finding such a question "not material"); rather, the provision of a meeting in exchange for the contribution satisfied the *Buckley* Court. The *Buckley* Court therefore equated corruption with the fundraising process and, in particular, the special access given to large contributors. *See Buckley*, 424 U.S. at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that *the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.*") (emphasis added).

Given the *Buckley* Court's understanding of corruption, it is not surprising that it explicitly did not require evidence of bribery of federal officeholders and candidates to support the contribution limitations in FECA. *Id.* at 27 ("Although the scope of such pernicious practices *can never be reliably ascertained*, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.") (emphasis added). In linking "corruption" with the fundraising process of large contributions in a donor-financed system of elections and not on specific evidence of bribery, the Supreme Court merely recognized the obvious: large contributions provide a "calling card" and can help "obtain" government favors. *Buckley*, 519 F.2d at 839 n.37 (cited by *Buckley*, 424 U.S. at 27 n.28). Contribution

1972 election a watershed for public confidence in the electoral system," *id.* at 840; *see also id.* at 839 n.36 (declining to rely on evidence that a large contribution was connected to the decision-making of the federal official).

limitations served to "prevent corruption" by removing the "*coercive influence*" that large contributions have when "given to secure a *political quid pro quo*" from elected officials or candidates. *Buckley*, 424 U.S. at 25, 26 (emphasis added). In fact, implicit in *Buckley*'s rejection of the argument that bribery laws constituted a less restrictive alternative than FECA's contribution limitations was a recognition that the threat addressed by bribery laws "deal[s] with only the most blatant and specific attempts of those with money to influence governmental action." *Id.* at 28; *see also id.* at 30 ("Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.").

Hence, it was very clear that in discussing corruption the *Buckley* Court concluded that bribery laws were not simply enough and that contribution restrictions were targeted at reducing the "coercive influence" of large monetary contributions on the political process. *Id.* at 25; *see also NCPAC*, 470 U.S. at 497 ("Corruption is a subversion of the *political process*. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political *favors*.") (emphasis added). In sum, as the *Shrink Missouri* Court effectively articulated:

> In speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, *but extending to the broader threat from politicians too compliant with the wishes of large contributors*. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental action" in ways less "blatant and specific" than bribery.

Shrink Missouri, 528 U.S. at 389 (quoting *Buckley*, 424 U.S. at 28) (emphasis added). This statement, in a nutshell, is what *Buckley* meant by "corruption."[155]

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[155] I therefore cannot agree with Judge Henderson, who states that the Supreme Court "has not settled on a precise definition of 'corruption.'" Henderson Op. at Part IV.A n.148. To reach this proposition, Judge Henderson contrasts this quotation from the *Shrink Missouri* majority opinion with Justice Thomas' dissent in that case and the Supreme Court's statement in *NCPAC* that "[t]he hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *NCPAC*, 470 U.S. at 497. Judge Henderson's footnote does not cite *Buckley* or even discuss its text in reaching this conclusion. As I have endeavored to explain at length in this section of my opinion, *Buckley* has clearly provided guidance as to what the Supreme Court meant by "corruption." *See also Colorado II*, 533 U.S. at 441 (defining "corruption [as] being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence").

Also on this point, I observe that although Judge Leon recognizes that corruption involves "something more than a quid pro quo arrangement . . . as well as improper influence or conduct by a donor that results in a legislator who is too compliant with the donor, Leon Op. at Part I.A.3 (internal quotation marks and citations omitted), Judge Leon-while stating the definition of corruption correctly-refers to corruption in his opinion as something resembling the characteristics of bribery, *id.* ("whether the corruption is actual or perceived, every traditional and accepted definition to date depends on the donor conferring, or being perceived as having conferred a benefit on the candidate in return for something") (citing and quoting to *Black's Law Dictionary* 's definition of "*quid pro quo* "). Thus, while Judge Leon and I apparently agree on the definition of corruption as defined by the Supreme Court, I cannot agree with the way Judge Leon employs his definition of corruption throughout his opinion as something akin to bribery. *See id.* at Part I.B.2 ("there is no evidence in the record of actual quid pro quo corruption") (citing evidence that there is no evidence of vote buying in the record).

(ii) The *Buckley* Court's Explanation of Prevention of the "Appearance of Corruption"

Additionally, the *Buckley* Court observed that it was not only preferential access given to large contributors through the fundraising process that was corrupting. The Supreme Court also recognized that the public perception associated with a regime of large individual contributions undermined faith in the government in the public at large. This concern was another aspect of the corruption thesis that the *Buckley* Court found supported upholding the individual limitations on contributions. As the *Buckley* Court states:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the *appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions* . . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Buckley, 424 U.S. at 27 (quoting *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973)) (emphasis added). Picking up on this discussion from *Buckley*, in *Shrink Missouri*, the Supreme Court observed:

> While neither law nor morals equate all political contributions, without more, with bribes, we spoke in *Buckley* of the perception of corruption "inherent in a regime of large individual financial contributions" to candidates for public office, [*Buckley*, 424 U.S. at 27], as a source of concern "almost equal" to *quid pro quo* improbity, *ibid.* The public interest in countering that perception was, indeed, the entire answer to the overbreadth claim raised in the *Buckley* case. *Id.* at 30. This made perfect sense. Leave the perception of impropriety unanswered, and the cynical assumption that

> large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961).

Shrink Missouri, 528 U.S. at 390. More recently, in *Colorado II*, the Supreme Court observed that "corruption [was] understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II*, 533 U.S. at 441.

Within the *Buckley* framework, it does not take too much imagination to realize the appearance of corruption associated with nonfederal donations to political party committees, particularly given that "*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible." *Shrink Missouri*, 528 U.S. at 391. In *Buckley* the evidence demonstrated that "corporations, well-financed interest groups, and rich individuals had made large contributions . . . [which was] more than sufficient to show why voters would tend to identify a big donation with a corrupt purpose." *Id.* at 391; *see also Buckley*, 519 F.2d at 838-40 (discussing "the trend revealed by the polls" that demonstrated that in 1974, 69.9 percent of individuals found that "the government is pretty much run by a few big interests looking out for themselves"). The *Buckley* Court, therefore, understood the "appearance of corruption" as the public perception that "large donors call the tune" that *inherently* exists in a donor financed election system that permits large contributions.

(iii) Circumvention as a Valid Theory of Corruption

Aside from the corruption associated with the preferential access to officeholders that large contributors receive through the fundraising process, and the public perception of corruption inherent in a regime of large individual, financial contributions, the Supreme Court recognized in *Buckley* that a circumvention of individual contribution limitations also serves as a basis for justifying contribution restrictions. Prior to BCRA's enactment, a donor was limited to give $1,000 to a candidate and his or her authorized committee for any election for Federal office. 2 U.S.C. § 441a. The same donor was limited to an aggregate of $20,000 to the political committees established and maintained by a national political party in any calendar year. In *Buckley,* the Supreme Court upheld FECA's $25,000 limitation on *total* contributions that an individual could make during any calendar year. In finding this provision constitutional, the Court held that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of . . . *huge contributions to the candidate's political party.*'' *Buckley,* 424 U.S. at 38 (emphasis added).

In upholding the $25,000 total contribution limitation, under this "anti- circumvention" theory, the Supreme Court did not engage in *any* separate constitutional balancing. In other words, the Supreme Court never discussed whether the $25,000 limitation was "closely drawn" to match a "sufficiently important interest." Instead, in one paragraph, the Supreme Court upheld the restriction on the premise that it was "no more than a corollary of the basic individual contribution limitation" that the Supreme Court had already determined to be constitutional. *Id.* at 38. Since *Buckley,* the "anti- circumvention" rationale has been upheld by the Supreme Court and is a well- accepted theory for justifying

congressional action in the area of campaign finance. *Colorado II,* 533 U.S. at 456 (noting that "all members of the [Supreme] Court agree that circumvention is a valid theory of corruption"); *California Med. Ass'n.,* 453 U.S. at 197-199 (plurality opinion) (upholding limitations on contributions to nonparty multicandidate political committees under an anti-circumvention rationale). If the provision in FECA limiting the total amount of contributions a donor could make was found constitutional by the *Buckley* Court on the basis that it was designed to keep the individual donor restrictions intact, it follows that the provisions in Title I-which are similarly designed to prevent evasion of the individual contribution limits in FECA-are constitutional.

In *Colorado II,* the Supreme Court powerfully reaffirmed its commitment to the anti-circumvention theory. *Colorado II,* 533 U.S. at 456-65. In *Colorado II,* the Supreme Court upheld FECA's limitations on coordinated expenditures by state political parties-a question that it had remanded during the *Colorado I* litigation. *Id.* The Court observed in *Colorado II* that "[s]ince there is no recent experience with unlimited coordinated spending, the question is whether experience under the present law confirms a serious *threat* of abuse from the unlimited coordinated party spending." *Id.* at 457 (emphasis added). Put differently, because unlimited coordinated expenditures had been prohibited since FECA, there was no evidence of whether or not such a system was actually corrupting. The Supreme Court concluded, however, that even though there was no evidence that unlimited coordinated expenditures were corrupting, Congress was empowered to exercise its predictive judgment. In the words of Defendant-Intervenors, Congress could preemptively act "to close loopholes and to prevent evasion of the contribution restrictions and limits established in FECA, and upheld in *Buckley* even in the absence of past abuses." Def.-Int. Br. at 53. With no evidence of present evasion, the Supreme Court in *Colorado II* found that "[d]espite years of enforcement of

the challenged limits, substantial evidence demonstrates how candidates, donors, and parties *test* the limits of the current law, and it shows beyond serious doubt how contribution limits *would be* eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open." *Colorado II*, 533 U.S. at 457 (emphasis added).[156]

The anti-circumvention rationale articulated by the *Colorado II* Court clearly supports the idea that Congress is entitled to exercise latitude in forming predictive judgments about possible evasion and circumvention of the law and is able to act accordingly to prevent such abuse. Circumvention of a current statutory regime or congressional prediction that "evasion" will occur if a prophylactic rule is not adopted is consonant with the *Buckley* Court's understanding of corruption. The *Buckley* Court was concerned with the "real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. Certainly, if an individual or organization is able to evade the law and engage in the kind of large financial giving that FECA was designed to prevent, then the system would be nullified and the "real or imagined coercive influence of large financial contributions" on candidates and officeholders would still exist. *Id.* In other words, the corruption would still be present. However, in such a situation, the appearance of corruption would only be worse. Where evasion is present in a carefully regulated regime, faith in the law is undermined when it is widely known that others are skirting the rules-even when what those individuals and organizations may be doing is considered

[156] Plaintiffs contend that in *Colorado II*, "the Court did not *really apply* an 'anticircumvention' rationale at all (despite some language in the Court's opinion to the contrary)." McConnell Opp'n at 23-24 (emphasis added). Plaintiffs' contention is erroneous given my reading of *Colorado II*.

legal. In *Colorado II*, for example, the Supreme Court determined that if unlimited coordinated expenditures were made legal, circumvention of the existing contribution limits *would* occur. *Colorado II*, 533 U.S. at 460 ("If suddenly every dollar of spending *could be* coordinated with the candidate, the inducement to circumvent would almost certainly intensify."). Circumvention as a theory of corruption, therefore, has a very strong lineage in Supreme Court campaign finance jurisprudence and is simply a logical outgrowth of *Buckley*'s teaching about corruption.

* * *

In sum, the *Buckley* decision represents an understanding that bribery laws are not enough to capture the more subtle and pervasive influences that large financial contributions can have on a donor-financed election system. The Supreme Court has long understood that the fundraising process, itself, is the source of corruption when large donations are given in exchange for access to influence federal officeholders and candidates. In enacting Title I of BCRA, Congress focused on this same problem that had developed with regard to fundraising of nonfederal funds.

(iv) Restrictions on Political Party Committee Fundraising are Necessary to Effectuate These Sufficiently Important Interests

As one scholar observes, "the rise of soft money, the enormous disparity between FECA's limits on individual and PAC donations to candidates and the much larger sums given in soft money, and the role of federal officeholders in soliciting soft money contributions to the parties suggest that donor-to-party-to-candidate conduit corruption is a real possibility." Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum.L.Rev. 620, 649 (2000) [hereinafter Briffault]. The record in this case demonstrates that the "donor-to-party-to-candidate conduit

corruption" is no longer just a "real possibility," but a reality. *Id.*

In *Colorado II*, the Supreme Court recognized that the donor-to-party-to-candidate conduit raised a legitimate concern regarding corruption. The *Colorado II* Court found that "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." *Colorado II*, 533 U.S. at 458. For this proposition, the Supreme Court cited a number of declarations, which Defendants have again included in this litigation. The Supreme Court observed that without a restriction limiting the political parties' coordinated expenditures, the contribution limitations would be rendered ineffective. *Id.* at 460 ("If suddenly every dollar of spending could be coordinated with the candidate the inducement to circumvent would almost certainly intensify.").

The evidence to support this finding bears repeating briefly here, because as the Supreme Court in *Colorado II* found donations made to the political party, as opposed to directly given to the candidate, can pose the same coercive influence that the restrictions in FECA were targeted to address. In *Colorado II*, the Supreme Court observed that "the record shows that even under present law substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." *Colorado II*, 533 U.S. at 461. As proof of this proposition, the Supreme Court noted in a footnote that "the DSCC has established exclusive clubs for the most generous donors, who are invited to special meetings and social events with Senators and candidates." *Id.* at 461 n.25. This evidence recognizes that large donations to

political party committees enables contributors to gain access to elected federal officeholders and candidates.[157]

This view of political parties by the Supreme Court is confirmed by their statement in *Colorado II* that "whether they like it or not, [political parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* at 452. One of the pieces of evidence that the Supreme Court relied on to support this view was the testimony of former Senator Paul Simon. *Id.* at 451 n.12. Senator Simon stated, "I believe people contribute to party committees on both sides of the aisle for the same reason that Federal Express does, because they want favors. There is an expectation that giving to party committees helps you legislatively." *Id.* (recounting a debate over a bill favored by Federal Express during which a colleague exclaimed, "'we've got to pay attention to who is buttering our bread").

In *Colorado II*, the Supreme Court also found persuasive the declaration of Robert Hickmott, former Democratic fundraiser and National Finance Director for Timothy Wirth's Senate campaign, who testified that "'[w]e ... told contributors who had made the maximum allowable contribution to the Wirth campaign but who wanted to do more that they could raise money for the DSCC so that we could get our maximum [Party Expenditure Provision] allocation from the DSCC.'" *Id.* at 458 (quoting declaration of Robert Hickmott) (second set of brackets in original). The Supreme Court also recounted the testimony of Senator Timothy Wirth that he "'understood that when [he] raised funds for the DSCC, the donors expected that [he] would

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[157] Of course, it bears pointing out that the Supreme Court's discussion of these donations was in the context of contributions that were within the $20,000 limit on donations to national party committees. The record *in this case* conclusively establishes that the nonfederal funds pouring into the national party coffers is from prohibited sources and significantly larger than the federal fund donations at issue in *Colorado II*.

receive the amount of their donations multiplied by a certain number that the DSCC had determined in advance, assuming the DSCC has raised other funds.'" *Id.* (quoting declaration of Timothy Wirth). Likewise, Leon G. Billings, former Executive Director of the Democratic Senatorial Campaign Committee (DSCC), testified that "'[p]eople often contribute to party committees because they have given the maximum amount to a candidate, and want to help the candidate indirectly by contributing to the party.'" *Id.* (quoting declaration of Leon G. Billings). In addition, the Supreme Court found merit in a fundraising letter from Congressman Wayne Allard, dated August 27, 1996, explaining to a contributor that "'you are at the limit of what you can directly contribute to my campaign,'" but "'you can further help my campaign by assisting the Colorado Republican Party.'" *Id.* (quoting fundraising letter from Congressman Wayne Allard, dated Aug. 27, 1996). In *Colorado II*, the Supreme Court also observed that an "informal bookkeeping" system developed, which in the Democratic Party was known as the "tallying system," that would link donations to the party committees with the candidates that had raised the money. *Id.* at 459. As explained by Mr. Hickmott and Senator Paul Simon, the accounting system essentially was an agreement between the DSCC and the candidates' campaign such that candidates were credited with generating donations for the DSCC. The DSCC, in turn, would support the candidate based on the amount of donations the candidate had collected for the DSCC. *Id.; see also id.* at 458 n.22 (noting that "tallying is a sign that contribution limits are being diluted and could be diluted further if the floodgates were open").

Accordingly, the Supreme Court has already accepted the proposition that "[p]arties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any

candidate who will be obliged to the contributors." *Colorado II*, 533 U.S. at 451-52. Senator Simon's testimony, along with the rest of the *Colorado II* evidence cited by the Supreme Court, has been included in this litigation. Plaintiffs have not made any effort to bring into question any of this evidence, and I accept it and the conclusions reached in *Colorado II* with regard to the evidence.

(v) Evidence from the Record Supporting the Asserted Government Interests

Before turning to the evidence from this record related to the asserted interests discussed above, it is important to make one, brief observation. In the instant case, Plaintiffs contend that the record before this Court, as relied on by Defendants, is nothing short of "an onslaught of anecdotal material about the role of [nonfederal funds] in the political process." McConnell Opp'n at 3. I disagree with Plaintiffs' characterization and find that the evidence in this case is no different from evidence produced in virtually every other campaign finance case that the Supreme Court has heard. Plaintiffs' criticism of the evidence from this record as merely "anecdotal" would have applied with equal force to the evidence the Supreme Court found persuasive in *Buckley* and *Colorado II*. For example, as discussed above, in *Colorado II*, the Supreme Court credited evidence from the FEC's public records, and the testimony of politicians, political consultants, party officials, scholars, and experts. To some degree, Plaintiffs' criticism of the record evidence as "anecdotal" only underscores the difficulty that Plaintiffs have in rebutting the testimony in this record that the fundraising process related to large donations of nonfederal funds to the party committees, particularly at the national level, presents the same problems with corruption and the appearance of corruption that was identified by the Supreme Court in *Buckley*.

(1) Evidence From the Record in this Case Relating to "Corruption" and the "Appearance of Corruption" as Defined in *Buckley*

Federal Officials Control the National Party Committees and are Intimately Involved in Raising Nonfederal Funds for the National Party Committees

The record in this case makes it clear that federal officeholders and candidates control the national political party committees and are so deeply involved in raising non-federal funds for the national party committees that there is no meaningful separation between the national committees and the federal candidates and officeholders that control them. Findings ¶ ¶ 1.50, 1.58. This finding supports the congressional decision to enact a complete ban on nonfederal funds at the national political party level.

All six national political party committees are controlled and dominated by federal officeholders or candidates. In the case of the DNC or RNC, both are headed by the President or presidential candidate of each party. Findings ¶ 1.47. In the case of the national congressional committees (DCCC, NRCC, DSCC, NRSC), the top leaders of each party in the House and the Senate head the committees and exercise control over them. *Id.* This very fact has led one of Defendants' experts to conclude that "[t]here is no meaningful separation between the national party committees and the public officials who control them." *Id.* Furthermore, "[f]or at least a century [the national party committees] have been melded into their party's presidential campaign every four years, often assuming a subsidiary role to the presidential candidate's personal campaign committee. The presidential candidate has traditionally been conceded the power to shape and use the committee, at least for the campaign." *Id.* ¶ 1.48.

The record also demonstrates that the primary purpose of the political parties is to get as many of its candidates elected

to public office. *Id.* ¶ 1.48.[158] This purpose drives the political parties' fundraising efforts. As Congressman Meehan notes, "political parties do not have economic interests apart from their ultimate goal of electing their candidates to office." *Id.*

The national political party committees request and encourage Members of Congress to solicit nonfederal money donations from contributors, and the personal involvement of high-ranking Members of Congress is a major component of the political parties' fundraising programs.[159] *Id.* ¶ ¶ 1.51, 1.53. The record is replete with testimony from current and former Members of Congress, political contributors, and lobbyists, all recounting examples or personal experiences where Members of Congress actively solicited nonfederal funds for their political parties. *Id.* 1.51. This testimony is corroborated by numerous internal documents from a Fortune 100 company requesting authorization for donations to national party committees in response to requests made by Members of Congress. *Id.* ¶ 1.74.3. An internal memorandum from this company notes that "[o]n the Democratic side, [our] advocates have already fielded soft money calls from House

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[158] The RNC presented testimony suggesting that electing its candidates is only one means of achieving its core political principles. Findings ¶¶ 1.49, 1.49.1. It claims it also strives to achieve its core principles by promoting an issue agenda that reflects its principles and governing in accordance with its principles. *Id.* ¶ 1.49.1. Its own internal documents show that its primary purpose "is to elect its candidates to public office." *Id.* Therefore, the testimony that electing candidates is not the RNC's primary purpose is rebutted and cannot be relied upon.

[159] The RNC's Finance Director states that it is rare for federal officials to make initial personal or telephonic solicitations of major donors for the RNC because the RNC has a policy against such practices. Findings ¶ 1.54. Whether such practices are rare or not, and whether or not the Finance Department has such a policy, the record is clear that such solicitations, initial and subsequent, do occur. *Id.* It is also clear that the Finance Director's statement does not extend to the NRSC or the NRCC. *See id.* ¶ 1 .51.

Democratic Leader Gephardt, House Democratic Caucus Chairman Frost, Democratic Congressional Campaign Chairman Kennedy, and Democratic Senatorial Campaign Chairman Torricelli. Similar contacts to raise soft money have been made by Republican congressional leaders." *Id.* ¶ 1.78.1. In addition, the record shows that national political party committees and candidates have formed joint fundraising committees, which share the burdens and the receipts of these joint ventures. *Id.* ¶ 1.57. These joint fundraising committees allow the national committees to collect whatever amount a particular donor gives in excess of the federal funds the candidate is permitted to accept. *Id.* All nonfederal funds raised by such joint committees go to the political party. *Id.*

Members have a number of reasons to oblige. First, as former Senator Dale Bumpers testifies, helping the party benefits the Member because it aids the party in "perform[ing] its function of keeping tabs on statements, politics and votes of opposition party members and groups." *Id.* ¶ 1.55. Former DNC and DSCC official Robert Hickmott observes that raising money for one's political party also helps the political party's efforts to maintain or obtain control of Congress, which serves the Member's own interests. *Id.* Second, the record demonstrates that while there may not be a formal commitment that the amount of money spent by the national party committees on their Members' behalf is connected to the amount of money they raise, there is, in former Senator David Boren's words, "at least a working understanding among the party officials and Senate candidates that the [nonfederal] money [raised by the candidate] will benefit the individual Senators' campaigns." *Id.; see also id.* ¶ 1.56.3, 1.56.4.

In regard to this latter point, as the Supreme Court already observed in *Colorado II*, an "informal bookkeeping" system was developed within the DSCC known as the "tallying

system," which was designed to credit different members with collecting donations for the DSCC. *Colorado II*, 533 U.S. at 459 (observing that based on the members efforts, the DSCC would determine its support for the candidate). The record in this litigation reflects that the DSCC continues to maintain a "credit" program, which credits nonfederal funds raised by a Senator or candidate for that person's party. Findings ¶ 1.56.3. TheNRCC, NRSC and DCCC do not have such a system; however, they advise Members of the amounts they have raised for the respective committees. *Id.* ¶ 1.56.4. Former Senator Simpson testifies that: "[w]hen donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they assist the party with fundraising, be it hard or soft money, the party will later assist their campaign." *Id.* ¶ 1.56.1.

Former Senator Simpson's observation about the donors' understanding concerning the use of the party donations is supported by other evidence in the record. A letter from an RNC contributor with an enclosed contribution states that "Congressman Scott McInnis deserve [sic] most of the recruitment credit." *Id.* ¶ 1.51. Similarly, a lobbyist testifies that donors are interested in making sure that particular Members of Congress receive "credit" for their contributions:

> Although the [nonfederal] donations are technically being made to political party committees, savvy donors are likely to carefully choose which elected officials can take credit for their contributions. If a Committee Chairman or senior member of the House or Senate Leadership calls and asks for a large contribution to his or her party's national House or Senate campaign committee, and the lobbyist's client is able to do so, the key elected official who is credited with bringing in the contribution, and possibly the senior officials, are likely

> to remember the donation and to recognize that such big donors' interests merit careful consideration.

Id. ¶ 1.78. Additional testimony shows that individual donors request that their nonfederal money contributions to the national party committees be applied to particular federal campaigns. *Id.* ¶ 1.56.2.[160]

Third, at least with regard to the DSCC and its "credit" program, former DSCC official Robert Hickmott testifies that Members can raise money and credit it to other candidates to obtain support from those they assisted if they plan to run for a leadership post. *Id.* ¶ 1.55. Fourth, the relationship between the candidate/Member and the party makes it difficult for the candidate/Member to avoid raising funds for the party. As Defendants' expert Donald Green puts it: "The ubiquitous role that parties play in the lives of federal officials means that no official can ignore the fundraising ambitions of his or her party." *Id.; see also id.* ¶ 1.46 (describing the unique relationship between candidates/Members and their parties).

Federal Candidates and Officeholders in Most Instances Are Aware of the Largest Contributors of Nonfederal Funds to the National Party Committees

The fact that federal officeholders are so intimately involved in the solicitation of nonfederal funds suggests that they are cognizant of the identities of the major national party committee donors, which in turn allows them to open their

[160] The record also contains the testimony of Plaintiff Thomas McInerney, a major contributor to the Republican Party. He states that his nonfederal donations to the RNC were intended to go to state and local election activities. Findings ¶ 1.56.2.1. This testimony does not rebut the testimony of others that such donations are often given for use in federal campaigns, *id.* ¶ 1.56.2, and his practice of giving to national political party committees to assist state and local election activity appears to be an exception to the general rule. Furthermore, nothing in BCRA prevents Mr. McInerney from donating nonfederal funds to state and local parties for use in state and local elections.

doors to these donors. *Id.* ¶ 1.71-1.72. In fact, the evidence demonstrates that it is difficult for Members of Congress not to know the identities of the large donors to their political parties. *Id.* As former Senator Bumpers testifies: "you cannot be a good Democratic or a good Republican Member and not be aware of who gave money to the party." *Id.* ¶ 1.71.2. Indeed, Members of Congress testify that they and their colleagues are cognizant of donations made to their parties.[161] *Id.* 1.71.2. For example, Congressman Shays stated on the floor of the House that "it's the candidates themselves and their surrogates who solicit soft money. The candidates know who makes these huge contributions and what these donors expect." *Id.* ¶ 1.71.2. Former Senator Simpson testifies:

> Party leaders would inform Members at caucus meetings who the big donors were. If the leaders tell you that a certain person or group has donated a large sum to the party and will be at an event Saturday night, you'll be sure to attend and get to know the person behind the donation. . . . Even if some members did not attend these events, they all still knew which donors gave the large donations, as the party publicizes who gives what.

Id. Similarly, Senator McCain observes that "[l]egislators of both parties often know who the large soft money contributors to their party are, particularly those legislators

[161] Other Members of Congress testify that they are *personally* unaware of who donates to the parties; however, these Members are almost all Defendant-Intervenors who were involved in the efforts to enact BCRA and, like Senator Feingold, have made efforts to distance themselves from nonfederal fundraising or had little interest in such information. *Id.* ¶ 1.71.1. Moreover, these Members do not claim to speak on behalf of all of their colleagues. *Id.*

Senator McConnell attests that he typically does not know the donation history of the individuals with whom he meets. The record demonstrates that he is aware of the donation history of some of the major donors to his campaign, and has sought nonfederal donations from at least one donor who had donated the maximum federal funds to his campaign. *Id.*

who have solicited soft money," and that "[d] onors or their lobbyists often inform a particular Senator that they have made a large donation." *Id.* Former Senator Simon candidly testifies that he would likely return a telephone call to a large contributor before making other calls. *Id.* Accordingly, either as a consequence of a donor-based election system, or as a result of federal candidates and officeholders raising large amounts of nonfederal funds for the national parties, federal candidates and officeholders know who makes large donations to the national party committees, which inevitably leads to special access for these donors to influence federal lawmakers.

Large Nonfederal Funds Donations Provide Contributors Access to Federal Officeholders

In addition, the record clearly establishes that large nonfederal money contributors are provided with special access to federal officeholders in a manner on par with the large individual donors discussed in *Buckley*. *Id.* ¶ ¶ 1.75-1.80.1, 1.81. This access provides these donors with opportunities to influence legislative activity, and is a major reason large donations are made to the political parties. As one Member of Congress put it: "access is it. Access is power. Access is clout. That's how this thing works . . . " *Id.* ¶ 1.75.2.

Although no empirical study has been able to demonstrate this point conclusively, App. ¶ III, testimony from those intimately involved in national political fundraising, as well as documents submitted as part of the record, provide powerful evidence that large nonfederal money donations provide such donors access to influence federal lawmakers.[162]

[162] As an aside, I do not find it particularly surprising that an empirical study has not been able to conclusively demonstrate this point. Access to federal officials may be subtle, less open to verification, and therefore less likely to be captured by empirical review. Furthermore, the fact that the FEC does not require nonfederal contributors to disclose these contributions makes the feasibility of such a study even more remote. The inability to empirically assess this matter would be troublesome if not for the record before this three-judge panel, which is rich with testimony from individuals intimately involved in nonfederal fundraising who describe the unprecedented access given to those who contribute large sums of nonfederal funds. In my judgment, the difficulty of being able to study this phenomenon empirically is of little consequence given this evidence. *See* Findings ¶ 1.81-1.82; App. ¶ III

Just like the Supreme Court panel that issued *Buckley*, I find this evidence-of specific examples of access given to large contributors-probative and compelling.

Numerous prominent lobbyists testify that in order to have access to Members of Congress, clients must combine their lobbying efforts with sizeable nonfederal money donations. *Id.* ¶ 1.75.1. Failure to do so, according to lobbyist Robert Rozen, will hinder a client's ability "to be treated seriously in Washington," by which he means, "to be a player and to have access" *Id.* He explains that "relationships [with Members of Congress] are established because people give a lot of money, relationships are built and are deepened because of more and more money, and that gets you across the threshold to getting the access you want, because you have established a relationship." *Id.* ¶ 1.74.1. The other lobbyists who testify in this case concur, including Daniel Murray, who notes that nonfederal funds, "ha[ve] become the favored method of supplying political support," which "begets . . . access to law-makers" because of the lack of any limit on how much may be donated. *Id.* ¶ 1.75.1. *Cf. Buckley,* 519 F.2d at 839 n.37 ("The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary as a "calling card, something that would get us in the door and make our point of view heard," Hearings before the Senate Select Comm. on Presidential Campaign Activities, 93d

Cong., 1st Sess. 5442 (1973) (Ashland Oil Co. Orin Atkins, Chairman).") (citation to Findings omitted).

Plaintiffs point out that one of these lobbyists claims that he is hired because of his ability to provide access to lawmakers regardless of whether or not the client has donated money to the parties. Findings ¶ 1.75.1.2. Similarly, an RNC official states that lobbying is a better way to achieve access to lawmakers than donating to their campaigns or parties, and Plaintiffs note that many individuals and entities who donate large sums of nonfederal funds also devote substantial sums to lobbying efforts, which can dwarf their nonfederal fund donations. *Id.*. While these observations have merit, it is clear from lobbyists, such as Wright Andrews, that the "amount of influence that a lobbyist has is often *directly correlated* to the amount of money that he or she and his or her clients infuse into the political system." *Id.* ¶ 1.75.1.3 (emphasis added). In fact, Andrews notes that many lobbyists have taken to hosting fundraisers themselves, which provide them with an opportunity to interact with lawmakers in a setting of their choosing and concludes that "[t]hose who are most heavily involved in giving and raising campaign finance money are frequently, and not surprisingly, the lobbyists with the most clout." *Id.* The lobbyist whom Plaintiffs tout as claiming he can achieve special access for his clients regardless of *their* contribution history, can provide that access in part because of political contributions made or arranged by his firm. *Id.* ¶ 1.75.1.2. Furthermore, lobbyists testify that traditional lobbying alone is not in and of itself sufficient to achieve a client's goals and that contributions are usually part of a lobbyist's "legislative plan." *Id.* ¶ 1.75.1.3. This point is bolstered by the numerous internal documents authored by employees of a Fortune 100 company's internal lobbying department, requesting authorization to make nonfederal donations to national party committees as part of efforts to "strengthen [its] relationship" with various federal lawmakers. *Id.* ¶ 1.74.3. In the words of one expert, "[i]t's not

either or .... the fact is most of the organizations and economic interests . . . lobbying, inside and outside lobbying, are also intimately involved in the political financing game and making large contributions to political parties. *Id.* ¶ 1.75.1.2.

Numerous former and current Members of Congress also testify that entities and individuals that make large contributions to the political parties do so because it provides them with special access to lawmakers which allows them to influence legislation.[163] *Id.* ¶ 1.75.2. Senator Rudman is blunt:

> Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. In these meetings, these special interests, often accompanied by lobbyists, press elected officials—Senators who either raised money from the special interest in question or who benefit directly or indirectly from their contributions to the Senator's party—to adopt their position on a matter of interest to them. Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way. No one says: "We gave money so you should do this to help us." No one needs to say it—it is perfectly understood by all participants in every such meeting.

Id.

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[163] Some Defendant-Intervenors in this case testify that they personally do not provide special access to large donors of nonfederal funds. Findings ¶ 1.75.2.1. These Members of Congress do not claim to speak for their colleagues or contradict their colleagues' testimony that such access is provided to major donors. *Id.; see also id.* ¶ 1.75.2.

Representatives of corporate nonfederal money donors echo the lobbyists' and former Members' testimony that nonfederal donations beget access. *Id.* 1.75.3. The Chairman Emeritus of United Airlines testifies that large nonfederal donations provide donors with benefits:

> namely, access and influence in Washington. Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors to the offices of individual and important Members of Congress and the Administration, giving donors the opportunity to argue for their corporation's or union's position on a particular statute, regulation, or other governmental action.

Id. The record contains internal documents which support this view. *Id.* ¶¶ 1.75.3, 1.78.1. One internal corporate memorandum states that "contributions and the related activities we have participated in have been key to our increased ability to get our views heard by the right policy makers on a timely basis; in other words, a smart investment." *Id.* 1.75.3. In addition, a poll of a random sample of 300 corporate executives employed by major U.S. corporations conducted by the Tarrance Group on behalf of the Committee for Economic Development ("CED") found that 75 percent of those surveyed said that "political donations give them an advantage in shaping legislation." *Id.* ¶¶ 1.70.1-¶ 1.70.1.1.

Wealthy individuals who donate large sums of nonfederal funds also share that they were provided with unique access after they made large contributions to the political parties. *Id.* ¶ 1.75.5. One individual testifies that after he made a $500,000 contribution to the DNC he was invited to a number of events where President Clinton was in attendance, including a small dinner with President Clinton and Vice President Gore that was billed as an opportunity to "give advice to the President." *Id.* He used the opportunity to speak

in favor of campaign finance reform and to urge the President to take a leadership role in the effort. *Id.* Another donor testifies that $50,000 in political donations provided him and his wife the opportunity to attend a dinner of 10 to 12 people, including President Clinton, which lasted two to three hours and involved "primarily a conversation about issues of importance to the nation and the President's program." *Id.* One wealthy contributor who states that he does not give to the political parties in order to secure special access admits that he has been offered such opportunities. *Id.*

The record establishes in compelling fashion that large nonfederal money donors are provided access to federal officeholders and candidates in exchange for their large contributions. Political parties play a role in facilitating this access to influence.

The National Party Committees Facilitate Access to Federal Officeholders for Their Large Nonfederal Donors

Both political parties and their congressional committees have dangled access to Members of Congress as an inducement to collect larger contributions from donors; these donations often take the form of nonfederal funds. *Id.* ¶¶ 1.76-1.77.10. In fact, the political parties have institutionalized this process by creating clubs for different ranges of donations; as donations escalate, so do the opportunities to attend special events with Members of Congress as well as the intimacy of these events.*Id.* For example, the NRCC's Congressional Forum was "designed to give its members [$15,000 PAC or individual contributors or $20,000 corporate contributors] an intimate setting to develop stronger working relationships with the new Republican Congressional majority." *Id.* ¶ 1.77.2. The NRSC's Group 21 required an annual donation of $100,000 and provided members small dinners with Senators and "VIP benefits." *Id.* The DCCC also had a $100,000 donor club called the "National Finance Board," which provided donors "two

private dinners with Leader Gephardt, Chairwoman Lowey, House Democratic Leadership and Ranking Members[and] two retreats with Leader Gephardt and Chairwoman Lowey . . . ." *Id.* ¶ 1.77.5. The state political parties have also used the enticement of special access to federal candidates to induce larger donations. *Id.* ¶ 1.77.6. The best example of this is a CDP brochure advertising the CDP's Trustees program, which required a $100,000 donation to the CDP. *Id.* The CDP "recognizes its extraordinary supporters with extraordinary opportunities," and provides "Trustees" with "[e]xclusive briefings, receptions and meetings with officials such as U.S. Senator Dianne Feinstein, U.S. Senator Barbara Boxer . . . and other national figures." *Id.*

Large contributions have therefore become the price of admission to attend events where relationships can be formed with Members of Congress and legislative issues can be discussed. Individual wealthy donors testify that "[p]olicy discussion with federal officials occurs at" these major donor events. *Id.* ¶ 1.75.5. The events "include speeches, question and answer sessions, and group policy discussions, but there is also time to talk to Members individually about substantive issues." *Id.* One witness testifies that, "when given the opportunity, some donors try to pigeonhole or corner Members . . . to discuss their issues at these events." *Id.* One donor to the RNC's Team 100, a club that requires a $100,000 donation every four years with $25,000 donations in each intervening year, wrote to the RNC Chairman telling him, "I do feel I have benefitted from Team 100 in the audience it has afforded me with party leaders." *Id.; see also id.* ¶ 1.77.1 (describing the Team 100 program). Lobbyist Robert Rozen describes the access provided by other political party events:

> [S]oft money contributions built around sporting events such as the Super Bowl or the Kentucky Derby, where you might spend a week with the Member, are even more useful. At the events that contributors are entitled to attend as a result of their contributions, some contributors will subtly or not-so-subtly discuss a legislative issue that they have an interest in. Contributors also use the events to establish relationships and then take advantage of the access by later calling the Member about a legislative issue or coming back and seeing the Member in his or her office. Obviously from the Member's perspective, it is hard to turn down a request for a meeting after you just spent a weekend with a contributor whose company just gave a large contribution to your political party.

Id. ¶ 1.77.9. A Fortune 100 company's internal lobbying department justified its request for a $1.4 million nonfederal funds budget for FY 1999 (from its general treasury) in part by noting:

> due to a significant [sic] in the number of events scheduled by the parties for their donors, the number of opportunities . . . to develop relationships with elected and administration officials has never been greater. As the parties compete more vigorously for soft money dollars, the number and quality of events for interacting with both the leadership and rank and file Members has been greatly increased. Between the six main committees (DNC, DSCC, DCCC, RNC, NRCC, NRSC) there are events both in and out of [Washington, D.C.] almost every day of the week.

Id. ¶ 1.78.1.

These events are touted by the parties as opportunities to meet and discuss issues with Members of Congress. *Id.* ¶ 1.77.8. For example, Senator McConnell, as head of the NRSC, wrote a solicitation letter which noted that the Republican Senate Council ($5,000 annual PAC contribution) and the Chairman's Foundation ($25,000 annual corporate gift) provide "excellent opportunities for both corporate executives and Washington representatives to meet and

discuss current issues with leading Republican Senators." The RNC sought $250,000 donations as part of its Annual Gala, and offered such donors breakfast with the Senate Majority Leader and Speaker of the House, as well as a "[l]uncheon with Republican House and Senate Leadership and the Republican House and Senate Committee Chairmen of your choice." *Id.* Furthermore, the political parties accept donor requests as to which Member they would like seated at their table at political party dinners. *Id.* ¶ 1.77.7. The record shows that donors request to be seated with specific Members or with Members who sit on particular committees, and that these requests have been met. *Id.*

The parties also facilitate access to Members of Congress outside of their donor events. According to Ms. Beverly Shea, the RNC Finance Division's "policy" is to not "force" federal officeholders to meet with donors, but that it may pass along requests to a Member's scheduler and say "this is a Team 100 member,[164] could you see if you could fit them in." *Id.* ¶ 1.76.1. This statement appears to be accurate. Nothing in the record demonstrates that meetings have been literally forced on Members of Congress. However, there is ample evidence that RNC officials request meetings with Members of Congress on behalf of large donors, which intimate or state bluntly the donor's generosity to the political party. A few examples illustrate how the RNC Finance Division's policy operates. The Chairman of the RNC handwrote the following note to Senate Majority Leader Robert Dole:

> Dear Bob
>
> [_____], CEO of Pfizer, has asked to see you on Wed. 11/1. He is extremely loyal and generous. He also is not longwinded. He'll tend to his business and not eat up

[164] Team 100 is an RNC donor club requiring a $100,000 donation every four years, and $25,000 donations each intervening year. Findings ¶ 158.

> extra time. They have proposed a [Internal Revenue Code §] 936 solution that [Republican Senator William] Roth and [Republican Congressman Bill] Archer are considering. I'm sure that is the issue. I'd appreciate it if you'd see [him]. [signed] Haley.

Id. ¶ 1.76. Another appeal for a meeting makes the connection between access and money even more apparent. An RNC letter sent to a staffer to Senator Hagel, asks Senator Hagel to meet with a donor for four "key" reasons including: "[h]e runs [sic] $80,000,000 high tech business," and "[h]e just contributed $100,000 to the RNC." *Id.* It also appears that RNC officials are so confident that their "requests" for meetings with large donors will be granted that they are offered to donors in advance of making such requests to the Member or the Member's staff. A letter from the RNC's Team 100 director thanks a donor for "facilitating Dow [Chemical]'s generous contribution to the Republican Party" and tells the donor: "Give me a call . . . and we can figure out when is a good time to bring your Dow [Chemical] leadership into town to see [RNC Chairman] Haley [Barbour], [Senate Majority Leader Robert] Dole & [Speaker of the House] Newt [Gingrich]." *Id.*

This practice is not limited to the RNC. The former head of the DNC testifies:

> Party and government officials participate in raising large contributions from interests that have matters pending before Executive agencies, the Congress, and other government agencies. Party officials, who are not themselves elected officials, offer to large money donors opportunities to meet with senior government officials. Donors use these opportunities—White House and congressional meetings—to press their views on matters pending before the government.

Id.

On some occasions the connection between access and donations has been made even more obvious. Call sheets in the record from the DNC and the CDP include instructions such as "Ask her to give 80k more this year for lunch with" President Clinton, and ask "if they might be able to do $25,000 for a small mtg with the President." *Id.* ¶ 1.77.10.

In sum, the record reflects that political parties facilitate access to federal candidates and officeholders in exchange for large nonfederal funds donations. It also reflects that some major donors admit that they contribute nonfederal funds, not to help with party building, but to gain access to federal candidates and officeholders.

Donors Contribute Large Nonfederal Money Donations to the National Party Committees For the Purpose of Obtaining Access to Federal Officeholders

It is clear that donors understand the system. The record is replete with examples of donors who give donations for the purpose of obtaining access to federal lawmakers and thereby influence government policy. *Id.* ¶¶ 1.74-1.74.5. Perhaps Roger Tamraz—made famous by his testimony during the Thompson Committee Hearings—summed it up best when he was asked if he made contributions to the DNC because he believed it might get him access and responded: "Senator, I'm going even farther. It's the only reason . . . ." *Id.* ¶ 1.74.3. Mr. Tamraz is not alone. One wealthy political fundraiser observes that "many soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal officeholders who can protect or advance specific interests through policy action or inaction." *Id.* He notes that some nonfederal money donors give "$250,000, $500,000, or more, year after year," and that for this kind of investment "you need to see a return," just like any other investment. *Id.* Other witnesses experienced with political donations also describe these donations as an "investment" or "the cost of doing

business." *Id.* One CEO comments that achieving access is important to corporate givers and that "[f]ederal officeholders actually appear to have sold themselves and the party cheaply. They could have gotten even more money, because of the potential importance of their decisions to the affected businesses." *Id.*

These donors have also discovered that nonfederal donations are more effective at obtaining access to federal lawmakers than federal contributions. *Id.* ¶ 1.78. As former DNC and DSCC official and current lobbyist Robert Hickmott observes: "If you want to get to know Members of Congress, or new Members of Congress, it is more efficient to write a $15,000 check to the DSCC and to get the opportunity to meet them at the various events than it would be to write fifteen $1,000 checks to fifteen different Senators, or Senators and candidates." *Id.* This sentiment is echoed by various lobbyists and major party contributors, including one lobbyist who notes that "a properly channeled $100,000 corporate soft money donation to the national Republican or Democratic congressional campaign committees can get the corporate donor more benefit than several smaller hard dollar contributions by that corporation's PAC." *Id.* Lobbyist Robert Rozen describes the mentality starkly:

> Donors to the national parties understand that if a federal officeholder is raising soft money—supposedly "non-federal" money—they are raising it for federal uses, namely to help that Member or other federal candidates in their elections. Many donors giving $100,000, $200,000, even $1 million, are doing that because it is a bigger favor than a smaller hard money contribution would be. That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money, certainly not because they want to help state candidates and rarely because they want the party to succeed . . . . The bigger

> soft money contributions are more likely to get your call returned or get you into the Member's office than smaller hard money contributions.

Id. As such, it is abundantly clear that, in general, a large majority of major donors of nonfederal funds to the political party committees contribute this money to gain access to federal officeholders and candidates not to support a political philosophy or "party building" activities. The fact that major nonfederal funds donors give to both political parties only underscores this point.

Contributors of Nonfederal Funds Give to Both Political Parties to Ensure Special Access

The importance to large contributors of gaining access to federal lawmakers in order to press their individual agendas leads many, in the words of one witness, to "hedge their bets, to ensure they get access to office holders on the issues that are important to them." *Id.* ¶ 1.79; *see also id.* ¶ 1.80. One CEO put it this way: "As a donor with business goals, if you want to enhance your chances of getting your issues paid attention to and favorably reviewed by Members of Congress, bipartisanship is the right way to go. Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective." *Id.* ¶ 1.79. The parties are aware of this view, as one document from the Ohio Republican party entitled "Why People Give" includes the observation: "many people give to both sides so that they will have access to whoever is the winner." *Id.* ¶ 1.80.[165]

[165] The RNC claims that the record "establishes that organizations and individuals may give to both parties because they desire to be actively involved in the political process." *Id.* ¶ 1.80.1. In support of this statement, the RNC provides a statement by a PhRMA representative that the group gives to the convention activities of both parties because "we are good civic participants," and a deposition statement from one of Defendants' experts acknowledging the *possibility* that donors provide

The record also contains evidence that the political parties exploit contributors' fears of losing access if they back one political party and that party loses control of Congress. One CEO describes the situation this way:

> [I]f you're giving a lot of soft money to one side, the other side knows. For many economically-oriented donors, there is a risk in giving to only one side, because the other side may read through FEC reports and have staff or a friendly lobbyist call and indicate that someone with interests before a certain committee has had their contributions to the other side noticed. They'll get a message that basically asks: "Are you sure you want to be giving only to one side? Don't you want to have friends on both sides of the aisle?" If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give. First of all, it's hard to get attention for your issue if you're not giving. Then, once you've decided to play the money game, you have to worry about being imbalanced, especially if there's bipartisan control or influence in Washington, which there usually is. In fact, during the 1990's, it became more and more acceptable to call someone, saying you saw he gave to this person, so he should also give to you or the person's opponent. Referring to someone's financial activity in the political arena used to be clearly off limits, and now it's increasingly common.

Id. ¶ 1.80; *see also id.* ¶ 1.70-1.70.4 (facts regarding pressure placed on political donors). An internal Eli Lilly and

support to both parties because they support some members from each party. *Id.* Although these statements suggest that donors "may" give to both parties for reasons other than access, they do not contradict the numerous statements and documents in the record that demonstrate that special access is the *primary* motivation for many donors who give to both parties. *Id.* Moreover, interests in participating in the political process and in obtaining special access to legislators to influence them are neither incompatible nor mutually exclusive.

Company document shows these concerns in action. *Id.* ¶ 1.79. The *Washington Post* had listed the company as a top donor to the Republican party. *Id.* A handwritten notation on a photocopy of the article says "Dems are upset . . . . White House stays Dem we are in trouble," and an internal memorandum refers to discussions with the White House indicating that Eli Lilly "can get back into this by giving $50[,000]-100,000 to the DNC—says they would be pleased with this." *Id.*

Another good example of this practice of giving to both political parties is that in 2000, a Fortune 100 company agreed to contribute $25,000 to the NRSC at the request of George Allen, the then-Republican-candidate in the 2000 Senatorial race in Virginia against incumbent Senator Chuck Robb. An employee noted that the company had donated to Senator Robb's Leadership PAC and that a similar contribution to the NRSC was necessary to balance out the company's support for the candidates. *Id.*

The Tarrance Group/CED poll of business leaders found that 74 percent of respondents "say pressure is placed on business leaders to make large political donations. The main reasons corporate America makes political contributions, the executives said is fear of retribution and to buy access to lawmakers." *Id.* ¶ 1.70.1. Another poll conducted in 1997 of major congressional donors found that 80 percent of those surveyed agreed that "officeholders regularly pressure donors for contributions." *Id.* ¶ 1.70.3.[166] Lobbyist Robert Rozen provides context for this fear:

> In some cases corporations and trade associations do not want to give in amounts over the hard money limits, but

[166] The poll also showed that 76 percent of the major donors surveyed believed the campaign finance system was either "broken and needs to be replaced," or "has problems and needs to be changed." *Id.* ¶ 1.70.3. Three-quarters of respondents supported a "ban on large 'soft money' donations." *Id.*

> they feel pressured to give in greater amounts and end up making soft money donations as well. They are under pressure, sometimes subtle and sometimes direct, from Members to give at levels higher than the hard money limits. For example, some Members in a position to influence legislation important to an industry naturally wonder why a company in that industry is not participating in fundraising events.

Id. ¶ 1.70.2. Former Senator Boren notes that political donors feel that they are victims of "shake[] down[s]." *Id.* ¶ 1.70.4. One internal memorandum from a Fortune 100 company notes that "our traditional competitors continue to contribute large amounts of soft money," and predicted that failure to "maintain our soft money participation during this election cycle-given the heightened scrutiny those contributions will receive in the current competitive climate—*may* give our new and traditional competitors an advantage in Washington. *Id.* ¶ 1.78.1 (emphasis in original); *see also Buckley*, 519 F.2d at 839 n.37 ("The disclosures of illegal corporate contributions in 1972 included the testimony of executives that they were motivated by the perception that this was necessary . . . 'in response to pressure for fear of a competitive disadvantage that might result.'") (quoting statement of former chairman of American Airlines, George Spater) (internal citations omitted) (cited in *Buckley*, 424 U.S. at 27 n.28).

The evidence detailed above clearly indicates that large donations to political parties, especially nonfederal donations, open doors to federal lawmakers' offices. The record shows that the reverse is also true: failure to provide large nonfederal donations can effectively block access to federal lawmakers. As one CEO put it: "It is obvious to me that large soft money donations do buy access, that they can influence federal policy, and that they are corrupting to federal officeholders and to donors. Additionally, these unlimited donations to political parties pose a far greater risk than do hard money contributions to candidates of at least the

appearance, if not the reality, of special interest influence on federal policy." Findings ¶ 1.83.6; *see generally id.* (testimony and poll results demonstrating wealthy individual donors find the campaign finance system as either corrupt or as creating the appearance of corruption). In sum, the evidence demonstrates that major donors of nonfederal money primarily give these contributions to the national committees to gain access to federal officeholders. Notably, the record also demonstrates that major nonfederal money donors give to the state and local committees for the benefit of federal officeholders and candidates.

Federal Candidates Are Cognizant of the Benefits of Having Nonfederal Money Donors Contribute to State Parties

Federal candidates understand that they can benefit from donations made to the state political parties. The evidence discussed *infra* demonstrates that candidates solicit contributions to the state parties to assist their campaigns. *See infra* at 556. However, perhaps the most probative evidence of the importance federal candidates place on such contributions is a letter written by Senator Mitch McConnell to one of his contributors. He writes:

> Since you have contributed the legal maximum to the McConnell Senate Committee, I wanted you to know that you can still contribute to the Victory 2000[167] program .... This program was an important part of President George W. Bush's impressive victory in Kentucky last year, and it will be critical to my race and others next year. *Id.* ¶ 1.60. Senator McConnell also handwrote: "This is important to me. Hope you can help." *Id; see also id.* (letter from Congressman Wayne Allard explaining to a contributor that although maxing

[167] Victory programs are programs designed by the state Republican parties in conjunction with the RNC and implemented by the state party with assistance from the RNC. *See* Findings ¶¶ 1.43.2.

> out to his campaign, the contributor could further help his campaign by donating to the Colorado Republican Party).

These additional facts confirm that nonfederal donations to the state political parties affect federal elections and are valued by federal candidates. It is therefore clear that such donations to state political parties can result in access to federal officials while also providing a route to circumvent FECA's limitations.

Political Donations Achieve Political Results

As discussed at length earlier, in the context of supporting contribution restrictions, *Buckley* and its progeny do not require evidence that large contributions to candidates were conditioned upon a certain decision by a federal officeholder or candidate. *Buckley*, 519 F.2d at 839 n.36 (cited in *Buckley*, 424 U.S. at 27 n.28) ("It is not material, for present purposes, to review the extended discussion in the Final Report on the controverted issue of whether the President's decision was in fact, or was represented to be, conditioned upon or "linked" to the reaffirmation of the pledge."). Nevertheless, a few examples from my Findings of Fact and prior caselaw illustrate that in many instances large nonfederal donations produce the desired result for the donor. Indeed, why else would corporate executives refer to general treasury contributions to the political parties as "investments" or the "cost of doing business" if results were not obtained? *See supra* at 530. Although there is no evidence in the record before this three-judge panel that federal bribery or gratuity laws have been violated in exchange for nonfederal funds, *see* Findings ¶ 1.64, that is not what *Buckley* requires as a basis for support of a contribution restriction. As *Buckley* observed, bribery laws "deal with only the most blatant and specific attempts of those with money to influence government action." *Buckley*, 424 U.S. at 28. Contribution limitations, like those in Title I and in *Buckley*, target the "opportunity for

abuse inherent in the process of raising large monetary contributions." *Id.* at 30. Former Senator Rudman speaks to this point:

> I understand that those who opposed passage of the Bipartisan Campaign Reform Act, and those who now challenge its constitutionality in Court, dare elected officials to point to specific [instances of vote buying]. I think this misses the point altogether. [The access and influence accorded large donors] is inherently, endemically, and hopelessly corrupting. You can't swim in the ocean without getting wet; you can't be part of this system without getting dirty.

Id. ¶ 1.65. The record in this case confirms Senator Rudman's view that large nonfederal contributions to the national political party committees achieve access. *See id.* ¶¶ 1.75-1.80.1, 1.81. The record also contains an example demonstrating that large nonfederal donations achieve their intended result—that is, having an effect "on candidates' positions and on their actions if elected to office." *Id.* ¶ 1.66. Senator Simon testifies:

> It is not unusual for large contributors to seek legislative favors in exchange for their contributions. A good example of that which stands out in my mind because it was so stark and recent occurred on the next to last day of the 1995-96 legislative session. Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2-year cycle to incumbent Members of Congress and almost $1 million in soft money to the political parties. I opposed this in the Democratic Caucus, arguing that even if it was good legislation, it should not be approved without holding a hearing, we should not cave in to special interests. One

> of my senior colleagues got up and said, 'I'm tired of Paul always talking about special interests; we've got to pay attention to who is buttering our bread.' I will never forget that. This was a clear example of donors getting their way, not on the merits of the legislation, but just because they had been big contributors. *I do not think there is any question that this is the reason it passed.*

Findings ¶ 1.66; *see also Colorado II*, 533 U.S. 431, 451 n.12 (2001) (quoting Senator Simon's declaration); *see also* Findings ¶ 1.66 (Senator Feingold testifying that in the fall of 1996 a senior Senator suggested to him that he support the Federal Express amendment because "they just gave us $100,000").

In addition, the record makes clear that the national political parties lobby their Members of Congress on various legislative issues. *Id.* ¶ 1.67. A document in the record suggests that at least on one occasion the political parties have asked Members to take a position on an issue because of a donor's interest in the issue. *Id.* ¶ 1.67.1.[168] Furthermore, Plaintiffs' expert La Raja acknowledges that the "potential for quid pro quo exchange between contributor and policymaker escalates with the size of the contribution," and recommends that "[t]o reduce the potential for corruption, I recommend that Congress place a cap on hard money contributions or, if soft money is banned, raise the limits on hard money contributions." *Id.* ¶ 1.69.

Therefore, while the record contains no evidence that federal bribery laws have been broken-something not required by *Buckley* to support the contribution restrictions at issue in the case-the record does contain certain examples showing that access achieves legislative results and creates the potential for such arrangements. Findings ¶¶ 1.63, 1.68.

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[168] There is also testimony in the record suggesting that the political parties threaten to withhold financial support for Members' campaigns if they do not take the political party's position on an issue. Findings ¶ 1.68.

Even without this evidence, the access provided to federal officeholders and candidates by the political party committees is more than sufficient to justify Congress's decision to enact Title I.

Polling Data Demonstrates an Appearance of Corruption Relating to Large Donations to the Political Parties

Evidence in the record demonstrates that the public, in response to the existence of large nonfederal donations, perceives corruption in the nation's campaign finance system. Findings ¶ 1.84. A poll conducted by two prominent political pollsters, Mark Mellman and Richard Wirthlin, shows that Americans believe that large donations to political parties affect the decisions of Members of Congress. *Id.* ¶¶ 1.83.1, 1.83.1.1 The poll found that 77 percent of Americans believe that big contributions to political parties have at least some impact on decisions made by the federal government—55 percent believe the impact is great. *Id.* Results from the 2002 Mellman and Wirthlin poll are also strikingly similar to those of a survey conducted in 1974 and cited by the D.C. Circuit in *Buckley,* which reported that 69.9 percent of respondents believed that "the government is pretty much run by a few big interests." *Buckley,* 519 F.2d at 838-39. Mellman and Wirthlin's survey found that 71 percent of those polled believe that Members of Congress make decisions based on what the big contributors to their party want, even if it is not what their constituents want or what the Member thinks is in the best interests of the country. Findings ¶ 1.83.1. An even greater percentage, 84 percent, believe that Members are more likely to listen to large party contributors because of their contributions, and 68 percent think that big contributors to political parties have blocked decisions by the federal government that could improve people's everyday lives. *Id.* The poll also reflects that the public perceives that their views are given less attention than those of large contributors. Eighty-one percent of those polled believe that the views of

those corporations, unions, interest groups or individuals who donate $50,000 or more to a political party would likely receive special consideration from Members of Congress, while only 24 percent believe a Member is "likely to give the opinion from someone like them special consideration." *Id.*

Professor Robert Shapiro's review of public opinion polls conducted since 1990 confirms the Mellman and Wirthlin conclusion that large nonfederal contributions are viewed as corrupting by the public. *Id.* ¶ 1.83.2. He concludes that the public is troubled and opposes large unregulated nonfederal contributions to political parties, that "a substantial proportion of the public has perceived corruption in the political system, and that we are losing ground." *Id.*

Another poll shows that 76 percent of high-level political contributors, those who know the campaign finance system first-hand, are critical of the regime. *Id.* ¶ 1.83.6. The polling data is confirmed by the testimony of corporate and individual donors stating that nonfederal donations corrupt the campaign finance system or create the appearance of corruption. *Id.*

This polling data on the appearance of corruption reflects a dispiriting reality. The public's perception of the influence and effect of large nonfederal donations justified Congressional action in enacting Title I.

Members of Congress Report that Constituents Are Concerned About Large Contributions to Political Parties Which Demonstrates an Appearance of Corruption

In addition to the polling data, Members of Congress have expressed concern that large contributions to their political parties create the appearance of corruption in the eyes of their constituents. *Id.* ¶ 1.83.3. Among them is former Senator Simpson, who testifies that "[b]oth during and after my service in the Senate, I have seen that citizens of both parties

are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." *Id.* Representative Asa Hutchinson wrote to the RNC Chairman that he could not support the RNC's proposed campaign finance bill because he had to balance the RNC's concerns

> with a concern of my constituents which is that their influence in politics is being diminished by the abuses of soft money .... If our party is unable to enact meaningful campaign finance reform while we're in control of Congress, then I believe this failure to act will result in more cynicism and create a growing lack of confidence in our efforts.

Id.

Members of Congress have also expressed concern over the appearance of corruption inherent in the intersection of large contributions and legislative action on issues of concern to the contributors. For example, Senator McCain testifies:

> [T]here's an appearance [of corruption] when there's a million dollar contribution from Merck and millions of dollars to your last fundraiser that you held, and then there is no progress on a prescription drug program. There's a terrible appearance there. There's a terrible appearance when the Generic Drug Bill, which passes by 78 votes through the Senate, is not allowed to be brought up in the House shortly after a huge fundraiser with multimillion dollar contributions from the pharmaceutical drug companies who are opposed to the legislation.

Id. ¶ 1.83.4. In addition, Senator Feingold has remarked that "a $200,000 contribution [was] given 2 days after the House marked up a bankruptcy bill by MBNA. OK, it is not illegal. Conceded. Maybe it is not even corrupt, but it certainly has the appearance of corruption to me and I think to many people." *Id.*

Examples like these are often picked up by the press, as evidenced by the sample press articles provided by Defendants. *Id.* ¶ 1.83.5; *see also id.* (Senator Simpson and Plaintiffs' expert Primo on the effect of press reports on the public's perception of corruption); *cf. Buckley*, 519 F.2d at 839 n.36 ("Looming large in the perception of the public and Congressmen was the revelation concerning the extensive contributions by dairy organizations to Nixon fund raisers, in order to gain a meeting with White House officials on price supports.").

Plaintiffs' expert La Raja comments:

> [O]ne cannot ignore the central claim of reformers that the cash-based electoral environment fosters mistrust of the political system. Observing the amounts of money raised and spent in campaigns makes the average American skeptical that the political process is fair. Such doubts raise questions about political legitimacy. Even if politicians are not corrupt—and there has been minimal evidence to prove this claim—there is certainly the appearance of corruption ....
>
> It does not help matters that parties contribute to the arms race in campaigns. By using soft money parties raise the ante in elections. Candidates feel vulnerable to parties and interest groups that sponsor issue ads so they raise more money than ever. Campaign costs increase as each side fights to a draw .... Thus, the foraging for campaign money contributes to the perspective that money corrupts the system.

Id. ¶ 1.83.7.

This testimony demonstrates that Members of Congress and political scientists were aware of the public's disaffection with the campaign finance system, and nonfederal money in particular, prior to BCRA's enactment.

Conclusion

In enacting Title I, Congress clearly was aware of the parallels between the "coercive influence" of unlimited donations to federal candidates addressed by FECA's contribution limitations, and the "coercive influence" of nonfederal money donations to the national political party committees the government asserts supports Title I. *See, e.g.*, Thompson Committee Report at 4563 (minority report) ("No one can deny that individuals who contribute substantial sums of money to candidates are likely to have more access to elected officials. And most of us think greater access brings greater influence. It was this concern over linkages between money, access and influence—amid allegations that Richard Nixon's 1968 and 1972 presidential campaigns accepted individual contributions of hundreds of thousands, even millions, of dollars—that spurred Congress to enact the original campaign finance laws. While those laws have evolved over the 20 years since that time, the goals have remained the same: to prevent wealthy private interests from exercising disproportionate influence over the government, to deter corruption, and to inform voters."); *see also id.* at 42-43 (majority report) ("Simply put, 25 years after Congress passed election reform laws intended to insulate the President from an unseemly and potentially corrupting involvement with campaign money, President Clinton spent enormous amounts of time during the 1996 election cycle raising money. In the ten months prior to the 1996 election, President Clinton attended more than 230 fundraising events, which raised $119,000,000. The President maintained such a pace for over a year before the election, often attending fundraisers five and six days each week. According to Presidential campaign advisor Dick Morris, President Clinton 'would say "I haven't slept in three days; every time I turn around they want me to be at a fundraiser . . . I cannot think, I cannot do anything. Every minute of my time is spent at these fundraisers." This frenzied pursuit of campaign contributions

raises obvious and disturbing questions. Can any President who spends this much time raising money focus adequately upon affairs of state? Is it even possible for such a President to *distinguish* between fundraising and policymaking?"). Congress appropriately recognized that nonfederal money donations are primarily "given to secure a political *quid pro quo* from current and potential office holders," which undermines "the integrity of our system of representative democracy." *Buckley*, 424 U.S. at 26-27.

The record in this case is impressive and is much more substantial than what was found in *Buckley* to support the contribution limitations at issue in that case. Prior to BCRA, federal candidates and officials assisted their national political party committees in raising enormous funds not only well outside FECA's amount limitations, but also outside FECA's source limitations. The large nonfederal money donations were primarily given for one purpose: they provided access to federal officeholders in order to exert influence over federal legislative activity. *Buckley* and its progeny hold that Congress has broad authority to combat the corruption associated with this situation. The corruption associated with nonfederal donations to political party committees, and the appearance of corruption in the mind of the public, therefore presents a compelling justification for Congress's enactment of Title I.

(2) Evidence From the Record in this Case Relating to Circumvention

Before turning to the evidence of circumvention in the record, it bears repeating that the record before the Supreme Court in *Colorado II* contained *no* actual evidence of political parties making unlimited coordinated expenditures, but just a hypothesis of what could occur if the "floodgates" to this practice were opened. *Colorado II*, 460 U.S. at 459 n.22. In *this case*, the record before the three-judge District Court establishes in compelling fashion that prior to the passage of

BCRA, the contribution limitations in FECA were rendered edentulous and that Congress, therefore, had justification to act. With that observation in mind, I turn to the evidence in the record related to circumvention.

The National Party Committees Collect and Spend Nonfederal Funds Primarily to Avoid FECA's Contribution Limitations

The record in this case amply demonstrates that the national political parties have used nonfederal funds to circumvent FECA's contribution limits. The evidence leads me to the same conclusion reached by Plaintiffs' expert Raymond La Raja:

> By exploiting soft money rules, the parties effectively sidestep the federal ceilings that prevent them from allocating resources efficiently in the closest contests. To navigate around the federal restrictions on soft money the parties have developed close ties with their state parties because these affiliates receive special exemptions for party building activity.

Findings ¶ 1.69. As La Raja notes, the national political parties have used nonfederal funds themselves, and through their state party counterparts, to affect federal elections, in contravention of the spirit, if not the letter, of FECA.

The national political parties use nonfederal funds for electioneering purposes, despite the fact that such funds are permitted under the rationale that they be used for "party building" activities. *Id.* ¶ 1.41. The evidence shows that political parties spend a great deal of the nonfederal funds that they raise on issue advocacy, *id.* ¶ 1.23-1.25, and testimony from political party officials and experts, as well as documents in the record, show that very few of these advertisements are aimed at party building, but rather are designed to affect federal elections.

The National Party Committees Spend Nonfederal Funds on "Issue Advocacy" Advertisements That Are Designed to Influence Federal Elections

The RNC's own experts testify that "issue advocacy outside the context of electioneering by political parties is rare," and that party-sponsored issue advertisements are intended to and do support the campaigns of federal candidates. *Id.* ¶ 1.19-1.19.1. These assertions are supported by the numerous examples of these advertisements submitted for the record, *see, e.g., id.* ¶¶ 1.14, 1.15, as well as the testimony of Members of Congress, federal candidates, political consultants, and an RNC official who acknowledges that the RNC's issue advocacy efforts are aimed at achieving a primary objective of getting more candidates elected, *id.* ¶ 1.19, 1.13. Many of these advertisements focus on a candidate's characteristics or past actions (without reference to a future legislative event), such as one which noted that a Congressional candidate had voted to raise taxes while in state and local government, and concluded with the line: "If you think *your* family pays *enough* taxes . . . Call [____]. Tell her to stop raising your taxes". *Id.* ¶ 1.14. Other advertisements run by political parties compare the past records of competing candidates in a stark and loaded fashion. *Id.* ¶ 1.15. One such advertisement stated that one candidate was "the only member of Congress who did not want to tell parents when a child molester moved into their neighborhood" but that the other "supports laws that protect our children and keep violent criminals in jail for their full terms." *Id.* Another such advertisement told viewers that one candidate supported a welfare program that "is restoring responsibility, pride and self-worth," but that the other "voted *against* moving able-bodied welfare recipients from welfare to work." *Id.* (emphasis in original). The notion that such advertisements are intended to promote issues and not political campaigns strains credulity.

The empirical evidence submitted shows that political party advertisements are overwhelmingly candidate-centered. Ninety-two percent of party-sponsored advertisements aired during the 2000 election did not identify the sponsoring political party by name, or encourage voters to register with or support the party. *Id.* ¶ 1.17. During the 1998 election cycle, of the $25.6 million spent by the political parties on advertisements, $24.6 million went to commercials that referred to a federal candidate; out of the 44,485 advertisements purchased by the parties, 42,599 identified a federal candidate. *Id.* ¶ 1.18.

Furthermore, it is clear that the political parties run their advertisements largely in competitive races, where the record shows they can have a significant impact on the outcome of the election. *Id.* ¶¶ 1.16-1.16.1. The political parties also run advertisements to assist their candidates' campaigns when they are low on funds. *Id.* ¶ 1.20. For example, the RNC spent $20 million in so-called "issue advocacy" to assist the Dole campaign between March and August 1996 when the campaign had almost run out of money. *Id.* The advertisements run by the RNC at this time included "The Story," *id.* ¶ 1.20.1, and "Pledge," *id.* 1.20.2, which exemplify the two themes of the RNC's campaign: build up then-Senator Dole and attack then-President Clinton, *id.* ¶ 1.20. The record shows that the RNC had done "quantitative and qualitative research [which] strongly suggest[ed] that ["The Story"]needs to be run," but was concerned that "[m]aking this spot pass the issue advocacy test may take some doing." *Id.* 1.20.1. Nevertheless, the advertisement was run and paid for in part with nonfederal funds. *Id.*

This record convincingly demonstrates that political party advertisements, on which much of the nonfederal funds collected by the national political party committees is spent, influence federal elections and have little to do with "party

building."[169] *Id.* 1.10, 1.22. The political parties are well aware of this as demonstrated by the fact one national political party committee openly solicited funds for an issue advocacy campaign by describing it as an effort "to ensure that the [Republican] party not only maintains, but expands our majorities in Congress." *Id.* ¶ 1.21. This reality, leads inevitably to the "conclusion that party soft money and electioneering in the guise of issue advocacy ha[s] rendered the FECA regime largely ineffectual." *Id.* ¶ 1.9.

National Party Committees Spend Comparatively Little Nonfederal Money on "Party Building Activities," Most of Which Have Some Impact on Federal Elections

Plaintiffs have provided examples of where national political parties have used nonfederal, or a mix of nonfederal and federal money, for what they call "party-building" activities. Activities such as state redistricting efforts, *id* ¶¶ 1.34-1.34.3, training seminars for candidates, party officials, activists and campaign staff, *id.* ¶ 1.36, state and local government affairs activities, *id.* ¶ 1.37, and minority outreach, *id.* ¶ 1.38, are all paid for with a mix of federal and nonfederal funds which demonstrates that they have an effect on federal elections, *id.* ¶ 1.40. Furthermore, the figures provided by the RNC show that these activities constituted a very small percentage of their nonfederal and combined spending for the 2000 cycle. *Id.* This finding computes with that of Plaintiffs' expert Raymond La Raja, who finds that only "8.5 percent of national party soft money expenditures went to 'mobilization' or 'grassroots'" activities during the 2000 election cycle. *Id.* ¶ 1.25.[170]

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[169] Indeed, many of the characteristics of political party advertisements mirror those of interest group-sponsored candidate-centered issue advocacy, detailed in my discussion of Title II, *supra*.

[170] The national political parties spend more nonfederal money on administrative expenses, which constitute operating expenses such as

The national political parties also spend nonfederal money on contributions to state and local candidate campaigns. *Id.* ¶ 1.39. Defendants' expert Thomas Mann found that during the 2000 election cycle, "the national parties contributed only $19 million directly to state and local candidates, less than 4% of their soft money spending and 1.6% of their total financial activity in 2000." *Id.* The RNC testifies that during the 2000 election campaign, it donated approximately $7.3 million in nonfederal funds to state and local candidates. *Id.* FEC documents show that this represents a very small percentage of the $163,521,510 in nonfederal funds the RNC spent during the 2000 election cycle. *Id.* Again, it is evident that despite Plaintiffs' examples, the vast majority of nonfederal funds are not being used for "party building" activities.

Nonfederal Money Donations Are Often Made on Behalf of Federal Candidates In Order to Circumvent FECA's Individual Limitations

Nonfederal donations to the national party committees, despite the fact they are supposed to be used for "party building" purposes, are often solicited and made with the intent that they will be used to assist a federal candidate's campaign. *Id.* 1.56. Senator Simpson observes that

> [d]onors do not really differentiate between hard and soft money; they often contribute to assist or gain favor with an individual politician. When donors give soft money to the parties, there is sometimes at least an implicit understanding that the money will be used to benefit a certain candidate. Likewise, Members know that if they

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salaries, benefits, supplies, and travel expenses; however, Plaintiffs' expert La Raja notes that these efforts do not constitute "party building" activities. Findings ¶¶ 1.35, 1.26 .4. Furthermore, these expenses are paid for with a mix of funds demonstrating that they too have an effect on federal elections. *Id.* ¶ 1.35.

> assist the party with fundraising, be it hard or soft money, the party will later assist their campaign.

Id. ¶ 1.56.1. The Findings demonstrate that donors who give nonfederal funds to political parties to support federal candidates are doing so to evade the individual contribution limitations. *See id.* ("Although soft money cannot be given directly to federal candidates, everyone knows that it is fairly easy to push the money through our tortured system to benefit specific candidates.") (quoting Senator Simpson). One donor explains that "[t]here appeared to be little difference between contributing directly to a candidate and making a donation to the [state] party. . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign." *Id.* ¶ 1.59.

These findings correlate to the record that was before the Supreme Court in *Colorado II*, which stands for the same principle, that for donors the national political parties act as conduits to federal candidates. *See supra* at 508. In the words of then-RNC Chairman Haley Barbour: "the purpose of a political party is to elect its candidates to public office . . . ." Findings ¶ 1.49.1. This sentiment is especially true with regard to the national congressional campaign committees. As Plaintiffs' expert La Raja observes, these committees traditionally limit their activities to assisting their candidates' campaigns. *Id.* ¶ 1.26.6. Therefore, the record reflects that major nonfederal money donors use political parties to produce "obligated officeholders." *Colorado II*, 533 U.S. at 452.

State and Local Party Committees Play an Integral Role in Helping the National Party Committees Spend Nonfederal Funds on Federal Elections

The record also demonstrates that the national political parties have used their state political party "branches," as

Plaintiff's expert Raymond La Raja terms them, as part of their FECA circumvention scheme. Findings ¶ 1.42. Indeed, the RNC admitted as much in its briefing:

> The Republican Party is *a single, unitary organization* that comprises various interrelated parts—the RNC, state and local parties, the RNC's 165 members, candidates identifying themselves as "Republicans," and so forth. Indeed, the state parties select the 165 voting members of the RNC, and the party through its convention and other mechanisms nominates candidates.

RNC Opp'n at 23 (emphasis added). As La Raja concludes, the closeness between the state and national political parties is a result of the attractiveness of using the state political parties' more favorable federal/nonfederal money allocation ratios to fund federal electioneering practices. Findings ¶ 1.42. Large sums of nonfederal funds have been transferred to the state political parties over the past decade. *Id.* ¶ 1.26.3. During the 2000 election cycle, over half of the nonfederal money raised by the national party committees was transferred to the state political parties, a sum reaching $266 million. *Id.* ¶¶ 1.26.3, 1.4.3. Rather than being used for "party-building" activities, as the rationale for nonfederal funds provides, a large proportion of these funds were used to finance issue advertisements intended to influence federal elections. *Id.* ¶¶ 1.26.4; *see also id.* ¶ 1.26. Plaintiffs' expert La Raja finds that when administrative expenses are excluded from the calculus, state political parties invest most nonfederal funds transferred from the national political parties on federal races, *and concludes that more nonfederal funds are used for media rather than party building. Id.* Similarly former Senator William Brock, who is also a former Chairman of the RNC, testifies that nonfederal funds are used almost exclusively to help elect federal candidates and not for "party building." *Id.* ¶ 1.11. A 1998 financial statement from the Republican Party of New Mexico shows that it received revenues of $1,524,634 in nonfederal transfers from other

Republican organizations, $1,110,987 in individual contributions, and $389,552 in federal transfers from Republican organizations. The state political party spent over one-third of its revenues on "issue advocacy." *Id.* ¶ 1.26.4.1.

Moreover, representatives of all the major national congressional committees testify that they transfer nonfederal funds to state political parties in order to purchase advertisements aimed at influencing federal elections. *Id.* ¶ 1.26.6. They also state that although the state political parties may reject the national party committee's requests that transferred money be wired to specific consultants to pay for specific advertisements, they generally comply with the request. In addition, advertisements supported with congressional committee funds are not produced or recorded until the national party committees provide final approval. *Id.* ¶ 1.26.7. Documentary evidence supports this testimony, and shows that the state political parties are merely conduits in this process. *Id.* ¶ 1.26.7.2 (communications from the NRCC to the CRP providing information about money that was wired to CRP's account with instructions to wire the money to a media consulting firm, and similar documents from the DCCC to the CDP), ¶ 1.26.7.1 (NRSC memorandum suggesting an idea for an attack advertisement, and a copy of an advertisement implementing the idea paid for by the Republican State Central Committee of Nevada). These statements and documents compute with Plaintiffs' expert La Raja's observation that "[i]t would be particularly surprising for congressional campaign committees to venture outside their traditional scope of helping candidates and invest in state party organizations." *Id.* ¶ 1.26.6. The record also demonstrates that the DNC and RNC operate in the same fashion. *Id.* ¶ 1.26.7.3, 1.26.7.2. By purchasing these advertisements through the state political parties, the national political parties take advantage of the better federal- to-nonfederal spending ratios under which the state political parties operate. *Id.* ¶ 1.26.2, 1.27.

In addition, both national political parties prepare and execute detailed campaign strategies with their state affiliates for election campaigns that include state and federal elections. *Id.* ¶ 1.43. The Democratic national and state political parties implement "Coordinated Campaigns" which aim to allocate resources and coordinate plans for the benefit of Democratic candidates up and down the entire ticket. *Id.* ¶ 1.43.1. The Republican Party develops and implements similar plans with its state party affiliates called "Victory Plans." *Id.* ¶¶ 1.43.2-1.43.2.3. These plans demonstrate the close affiliation and cooperation between the national and state political parties that has led one state political party official to conclude that her state political party and national political party were "integrally related." *Id.* ¶ 1.43.1.

Therefore, it is very apparent that prior to BCRA's enactment national political party committees were using their state branches to assist in their circumvention of FECA, and in the process were integrating the state political parties into the national political party structure. Given this scenario, Congress made an appropriate predictive judgment that the enactment of BCRA's ban on nonfederal donations to the national political parties would escalate the use of nonfederal donations to state political parties to circumvent national campaign finance laws. *Id.* ¶¶ 1.44, 1.45.

It should be noted that Congress's concern—that restrictions on state and local political parties were necessary to prevent evasion of the nonfederal money ban at the national committee level—is justified not only by the record in this case, but by Congress's institutional experience in the area of campaign finance regulation. The evidence before the *Buckley* Court indicated that the $2 million contribution from the dairy industry to President Nixon's campaign was divided up into smaller amounts among hundreds of *state-level committees* in order to avoid disclosure requirements. *Buckley,* 519 F.2d at 839 n.36 (cited in *Buckley,* 424 U.S. at

27 n.28). Therefore, the technique of shifting money used to benefit a federal candidate from the national level to the state level in order to avoid a federal restriction is not new. Congress appropriately recognized the threat to the nonfederal funds prohibition at the national committee level, if the state and local political party committees were not prevented from using nonfederal funds on activities that directly influence federal elections.

Nonfederal Money Donations Are Provided to State Party Committees on Behalf of Federal Candidates In Order to Benefit the Federal Candidate

Furthermore, federal candidates and national party committees inform donors who have given the maximum amount of federal funds to their campaigns/committees that they can still help federal candidates by donating funds to state political parties. Findings ¶¶ 1.59, 1.60. An example of this is Congressman Wayne Allard's letter relied on in *Colorado II* and discussed *supra* at 510. One CEO describes the practice this way:

> In 1992, when I told the Democratic Party that I wanted to support then- Governor Bill Clinton's presidential campaign, they suggested that I make a $20,000 hard money contribution to the DNC, which I did. The Democratic Party then made clear to me that although there was a limit to how much hard money I could contribute, I could still help with Clinton's presidential campaign by contributing to state Democratic committees. . . . Accordingly, at the request of the DNC, I also made donations on my own behalf to state Democratic committees outside of my home state . . . . Through my contributions to the political parties, I was able to give more money to further Clinton's candidacy than I was able to give directly to his campaign.

Findings ¶ 1.59. One wealthy contributor provides similar testimony:

> Federal candidates have often asked me to donate to state parties, rather than the joint committees, when they feel that's where they need some extra help in their campaigns. I've given significant amounts to the state parties in South Dakota and North Dakota because all the Senators representing those states are good friends, and I know that it's difficult to raise large sums in those states. The DSCC has also requested that I provide assistance to state parties.

Id. ¶ 1.60. As former DNC and DSCC official Robert Hickmott explains, "[o]nce you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to . . . the relevant state party . . . ." *Id.* ¶ 1.59.

In addition, one CEO comments that in the past, donors who had reached their federal limit would ask candidates if a nonfederal contribution would assist the campaign and were told: "Don't bother. The soft money just doesn't do me any good." However,

> in recent election cycles, Members and national committees have asked soft money donors to write soft money checks to state and national parties solely in order to assist federal campaigns. Most soft money donors don't ask and don't care why the money is going to a particular state party, a party with which they may have no connection. What matters is that the donor has done what the Member asked.

Id. ¶ 1.51; *see also id.* ¶ 1.61. It is clear that these donations are valued by the national political parties and federal candidates/officeholders who solicit them. *Id.* ¶ 1.62.

The record detailed above demonstrates that both major political parties collect nonfederal funds, and direct nonfederal contributions to their state party "branches," in order to use that money to influence federal elections. The

national political parties also transfer nonfederal money through the state parties for the same purpose. The evidence shows the amounts spent on "party building" and in support of state and local candidates is a small fraction of the total amount of nonfederal funds raised by the national political parties. Not including administrative expenses, the majority of these funds are used for so-called "issue advocacy" designed to affect federal elections. After reviewing this record, I find myself in agreement with Plaintiff's expert La Raja: the parties

> are highly functional rather than responsible. Rather than use soft money to shore up weaker organizations, or reward state party members for moving closer to national party ideology, the national organizations use soft money like hard money—to pursue the short-term goal of winning elections.

Id. ¶ 1.26.5.

Political Party Committees Suggest Donors Contribute to Issue Advocacy Organizations

The record also demonstrates that prior to BCRA, political parties and candidates would solicit and donate funds to tax-exempt organizations, which would then fund activities in order to influence federal elections on behalf of the political party or candidate-donor. *Id.* ¶ 1.85. Former DNC and DSCC official Robert Hickmott testifies that

> [o]nce you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations . . . [to] an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign . . . . As a result, there are multiple avenues for a person or group that has the financial resources to assist a federal candidate

financially in his or her election effort, both with hard and soft money.

Findings ¶ 1.59.

In addition, the record reflects that each Republican Party national committee has donated funds to the National Right to Life Committee, which Senator Phil Gramm, as NRSC Chairman, explained was done to "help activate pro-life voters in some key states, where they would be pivotal to the election." *Id.* ¶ 1.85.2. Other documents in the record show sizable political party donations have been made to nonprofit groups with common political views in close proximity to federal elections to be used to mobilize the party's voters. *Id* ¶¶ 1.85.2, 1.85.3.

That such donations are used to affect federal elections is also demonstrated by the fact that the national party committees and federal candidates or officeholders solicit donations for tax-exempt groups. The National Right to Work Committee ("NRTWC") admits that "certain Members [of Congress] or Executive Branch Officials have generally encouraged financial support for the Right to Work cause and, specifically, for the support of NRTWC in advocating for these issues, through lobbying as well as issue advertising." *Id.* ¶ 1.85.4. A letter in the record from Congressman Pete Sessions asks a recipient to meet with NRTWC personnel regarding the group's effort to "stop Big Labor from seizing control of Congress in November." *Id.* ¶ 1.85.5. Similarly, Congressman Ric Keller signed a fundraising letter for The Club for Growth, which assured potential donors that their money would be used to "help Republicans keep control of Congress." *Id.* The record also demonstrates that the DSCC and DNC informs donors which tax-exempt organizations are most effective at grassroots activities that affect federal elections. *Id* ¶ 1.85.1. Some of these organizations are organized as ballot measure committees or political clubs that engage in voter

mobilization efforts which, when aimed at elections with federal candidates on the ballot, affect federal elections. *See id.* ¶¶ 1.85.6, 1.85.8.

In addition, evidence in the record shows that federal officeholders and candidates themselves have created their own tax-exempt organizations to assist in their election activities. According to Public Citizen, 63 Members of Congress have organizations organized under Section 527 of the Internal Revenue Code, and another 38 "have a stake in the Congressional Black Caucus [] 527 organization." *Id.* 1.85.7. These 527 organizations are used to promote the Member's career, as well as encourage strong state and local candidates and spur partisan get-out-the vote efforts. *Id.* ¶ 1.85.7.1. One large DNC contributor testifies that in early 2002 he donated $50,000 to the Daschle Democrats, a 527 organization, which ran advertisements in support of Senator Tom Daschle in response to attacks made against him. The contributor made the donation "because [he] felt that the attacks were hurting Senator Daschle and Senator Tim Johnson's re-election campaign as well." *Id.* ¶ 1.85.7.2. The DNC has made large contributions to Section 527 groups organized by candidates. *Id.* ¶ 1.85.7.3. Corporations also make large donations to federal officeholder and candidate 527 organizations. *Id.* ¶ 1.85.7.3.

Congress was obviously concerned about this practice when it enacted Title I. For example, legislative history reflects a discussion of Judith Vasquez's contribution to a tax-exempt organization. Ms. Vasquez wanted to contribute $100,000 to the DNC, however because Ms. Vasquez was not a United States citizen, the donation was "problematic." Thompson Committee Report at 3663 (majority report). Therefore, Ms. Vasquez was told to donate the money to "Vote Now '96," "a tax-exempt GOTV organization that focused on traditional Democratic constituencies." *Id.* "Vasquez ultimately donated $100,000 to Vote '96." *Id.* at

7105 (minority report). The legislative history also includes an NRSC document entitled "Coalition Building Manual," issued in 1994, the text of which was included in the congressional record. *Id.* at 5969 (minority report) (discussing the document); *see also id.* at 5987-6015 (Coalition Building Manual). The Manual states in particular that "*[w]hat we say about ourselves is suspect, but what others say about us is credible.*" *Id.* at 5990 (emphasis in original).

It is clear that political parties and candidates have used tax-exempt organizations to assist them in their efforts to win federal elections. *Id.* ¶ 1.86. Given this fact, and the fact that BCRA prohibits state and national political parties from using nonfederal funds to affect federal elections, the attractiveness of using these tax-exempt proxies would become even more attractive to the political parties if nothing had been done by Congress to address this obvious circumvention route. *Id.*

Conclusion

The massive record in this case thus clearly demonstrates that the national political party committees raise funds outside of *Buckley*'s source and amount limitations for purposes directly related to federal elections. Moreover, state and local party committees, in addition to nonprofit advocacy organizations, are used by the national party committees as part of their circumvention scheme. Congress was correct to conclude, therefore, that a prohibition on nonfederal funds at the national committee level would be ineffective at ending circumvention of FECA's contribution limitations. Accordingly, given the comprehensive record developed in this case, which presents impressive evidence that nonfederal funds secure easy evasion of the individual contribution limitations, I find that Congress was justified in enacting Section Title I under an anti-circumvention theory of corruption.

(b) *Title I Is Closely Drawn*

(i) Section 323(a) is Closely Drawn

In my view, Section 323(a) is closelydrawn to match the sufficiently important governmental interests discussed above. When a court reviews a contribution limitation enacted by a coordinate political branch, the court's review is more deferential than if the restriction at issue were an expenditure. In reviewing contribution restrictions, the Supreme Court has deferred to congressional expertise as to both the need for prophylactic measures or the particularities of those measures. *See NRWC*, 459 U.S. at 210 ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."); *see also NCPAC*, 470 U.S. at 500 (observing that deference is proper, but that it did "not suffice to establish the validity" of the *expenditure* restriction at issue in that case); Def.-Int. Opp'n at 24. As Justice Breyer wrote in his concurring opinion in *Shrink Missouri:*

> In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways-the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative). Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from

> effective electoral challenge. *This approach is that taken in fact by Buckley for contributions . . .*

Shrink Missouri, 528 U.S. at 402 (Breyer, J., concurring) (emphasis added). Given my view that this three-judge District Court should give deference to Congress's judgment in the area of contribution restrictions, and finding that no less restrictive alternative would ameliorate the problems Congress sought to address with Section 323(a), I find the provision closely drawn.

Plaintiffs argue that Section 323(a) is overbroad because it does not focus on the amount or source of the national party committees' funding and instead bans donations of all nonfederal funds regardless of the amount. McConnell Br. at 38 ("To the extent that it is the *amount* or *source* of *donations* of [nonfederal] funds which gives rise to actual or apparent corruption, Title I contains no relevant tailoring at all.") (emphasis in original); McConnell Opp'n at 27; McConnell Reply at 21-22; *see also* RNC Br. at 45. Plaintiffs cite the Hagel amendment as an example of a more narrowly tailored approach that Congress should have adopted. McConnell Br. at 38 n.14. The Hagel amendment would have imposed a $60,000 limit on aggregate donations of federal and nonfederal funds from any one donor to a national party committee. I do not find Plaintiffs' argument persuasive.

In *Buckley*, the challengers to FECA's contribution limitations argued that the $1,000 limitation was "unrealistically low." *Buckley*, 424 U.S. at 30. In flatly rejecting this argument, the Supreme Court adopted the D.C. Circuit's statement that "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'" *Id.* (quoting *Buckley*, 519 F.2d at 842) (observing that "Congress' failure to engage in such fine tuning" by scaling the contribution limitations based on the differences between congressional and Presidential campaigns was not

fatal to the contribution restrictions"). In much the same manner, Congress has made a judgment that contributions of nonfederal funds to national political party committees permits easy circumvention of FECA's contribution limitations and raises an appearance of corruption, and that the only means of addressing this problem is a complete ban at the national political party level. Much as *Buckley* instructed that courts should not use a scalpel to probe to see if a less restrictive means might be available, this three-judge District Court should defer to Congress's judgment that any cap on nonfederal funds would not ameliorate the abuses it sought to be extinguished. Indeed, a cap on nonfederal funds would likely be constitutionally suspect because the potential for circumvention would still exist and the appearance of corruption surrounding $60,000 in donations to the national political party committees would still be present.

In short, Congress would not have accomplished its goal with such a cap because the national political party committees would still be able to use the allocation percentages to inject nonfederal funds into federal elections. Congress concluded that the FEC's approach for allocation was no longer acceptable at the national political party committee level. In my judgment, Congress is entitled to make that judgment.[171] Moreover, all nonfederal funds,

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[171] Plaintiffs also argue that Section 323(a) is particularly overbroad with respect to "minor parties" like the Libertarian Party which receives virtually no donations of large amounts or donations from corporations. McConnell Br. at 38; McConnell Opp'n at 28-29. *Buckley* forecloses this argument. In *Buckley*, the Supreme Court observed that "minor-party candidates may win elective office or have a substantial impact on the outcome of an election." *Buckley*, 424 U.S. at 35; *see also id.* at 70. The *Buckley* Court, therefore, refused to exempt minor parties, one of which was the Libertarian Party, *see id.* at 34 n.40, from the contribution limitations. Accordingly, I do not find that BCRA is overbroad because it applies to minor party candidates, and I also find that Plaintiffs have not

regardless of the source, pose the same potential for corruption. While corporate and labor union donations of nonfederal funds may be more egregious in their use, given longstanding federal policy against their use in federal elections, it is not simply corporate and labor union donations that pose a problem. Contribution limitations are being directly circumvented by individuals as well as corporations and labor unions. Plaintiffs' argument that BCRA could have been tailored better had it focused on particular sources is therefore unavailing.

Plaintiffs also contend that Section 323(a) is overbroad because it bans the receipt and disbursement of nonfederal funds "no matter the purpose for which the funds are being given or spent." McConnell Br. at 39; McConnell Opp'n at 28; *see also* McConnell Reply at 22; RNC Opp'n at 30-31. The critical assumption that Plaintiffs make is that the "use" of nonfederal funds is what creates the actual or apparent corruption. McConnell Br. at 38. The assumption by Plaintiffs is fatal to their argument.

As demonstrated above, the corruption associated with nonfederal funds is much greater than the "uses" for which the money is put. Merely preventing the national political party committees from spending nonfederal funds on certain activities would do nothing to address the corruption associated with the national political party committees soliciting and collecting nonfederal funds. The law is targeted at the *collection and solicitation* of nonfederal funds, which are precisely the types of activities that Congress found posed the greatest threat of corruption. Moreover, simply preventing the national political party committees from using "soft money" to pay for the kinds of "issue" advertisements at which Title II is directed, would do little, if anything, to

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presented sufficient evidence to re-evaluate *Buckley*'s conclusion regarding minor parties.

prevent, in *Buckley*'s words, "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27. As amply demonstrated above, simply because the political party is the solicitor of the funds is of no import, given that the political party committees are "agents for spending on behalf of those who seek to produce obligated officeholders." *Colorado II*, 533 U.S. at 452. Regardless of the ultimate use of nonfederal funds, Congress appropriately concluded that the solicitation and raising of nonfederal funds posed such a significant threat of corruption that the only means of addressing the problem was a complete ban at the national committee level.

In this vein, Plaintiffs argue that "the Supreme Court itself has already concluded that the opportunity for corruption posed by unregulated soft money contributions to a party for certain activities such as electing candidates for state office or for voter registration and get out the vote drives is at best, attenuated." RNC Br. at 45 (quoting *Colorado Republican Fed. Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 616 (1996)) (emphasis removed) (internal quotation marks omitted). I disagree and find that the plurality opinion in *Colorado I* actually provides authority for Congress's enactment of Section 323(a). Justice Breyer's plurality opinion demonstrates this point:

> We recognize that FECA permits individuals to contribute more money ($20,000) to a party than to a candidate ($1,000) or to other political committees ($5,000). 2 U.S.C. § 441a(a). We also recognize that FECA permits unregulated "soft money" contributions to a party for certain activities, such as electing candidates for state office, see § 431(8)(A)(i), or for voter registration and "get out the vote" drives, see § 431(8)(B)(xii). But the opportunity for corruption posed by these greater opportunities for contributions is,

> at best, attenuated. Unregulated "soft money" contributions *may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute.* See § 431(8)(B).

Colorado I, 518 U.S. at 616 (emphasis added). As is clear from the emphasized language, the critical assumption behind Justice Breyer's conclusion relating to nonfederal funds is that "'soft money' contributions may not be used to influence a federal campaign, except when used in the limited, party-building activities specifically designated in the statute." *Colorado I*, 518 U.S. at 616. However, as the record demonstrates in *this* case, Congress found that nonfederal funds were being used in massive amounts to influence federal campaigns. The pre-BCRA situation obviously changes the fundamental supposition underlying Justice Breyer's statement, which was premised on a factual record developed prior to the rise of soft money as a financing tool for federal election purposes.[172] Indeed, as Justice Breyer

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[172] The Defendant-Intervenors point out that in *Colorado I*

> [t]he initial administrative complaint which led to the civil action was filed on June 12, 1986, and the parties' cross-motions for summary judgment in the civil action were filed in 1990, thereby shutting off further discovery. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F.Supp. 1448, 1451 (1993), *rev'd, FEC v. Colorado Republican Fed. Campaign Comm.*, 59 F.3d 1015 (10th Cir.1995), *vacated, Colorado I, 518* U.S. 604 (1996). The *Colorado I* plurality was careful to acknowledge that its conclusions about the link between independent expenditures and corruption were premised on the Court's precedents in the absence of contrary factual evidence in the record. See *Colorado I*, 518 *U.S.* at 617-18 (Court lacked "convincing evidence"; "Government does not point to record evidence"). The language in the controlling opinion suggests that the Court could revisit its conclusions if faced with evidence calling those conclusions into doubt; for example, the Court did not say that there could not be any "special dangers of corruption associated with political parties," only that it was "not

more recently observed in his concurrence in *Shrink Missouri*, "After all, *Buckley*'s holding seems to leave the political branches broad authority to enact laws regulating contributions that take the form of 'soft money.'" *Shrink Missouri*, 528 U.S. at 404 (Breyer, J., concurring). Accordingly, I do not find Plaintiffs' argument relating to *Colorado I* to have merit. With BCRA, Congress responded to the wholesale evasion of the contribution limitations and on the basis of empirical evidence and experience, enacted Section 323(a), concluding "that the potential for evasion of the individual contribution limits was a serious matter." *Colorado I*, 518 U.S. at 617.

Plaintiffs also argue that Section 323(a) is not closely drawn because it "sweeps in activity relating only to state and local elections and therefore does not serve to get federal candidates elected at all." McConnell Br. at 39; McConnell Opp'n at 29; McConnell Reply at 20-21. Plaintiffs' argument, however, ignores the compelling reason behind Section 323(a): namely, that the close relationship between national political parties and federal officials justified nothing else but a complete prohibition on raising nonfederal funds at the national party committee level.[173]

> *aware* of any" such dangers. *Id.* at 616 (emphasis added). Def.-Int. Reply Br. at 38 n. 114.

[173] This point applies equally to Plaintiffs' suggestion that a more narrowly tailored approach would have been to simply prohibit labor unions and corporations from contributing nonfederal funds to the national political party committees. *See* McConnell Opp'n at 27. Such a prohibition would not address the actual or apparent corruption Congress sought to address with Section 323(a). The record amply demonstrates that the corrupting potential of nonfederal funds donations was not simply confined to a particular source but with the actual or apparent corruption posed by the solicitation of nonfederal funds by federal officeholders and candidates and the problems created by the national committees' efforts to evade federal contribution limitations.

Supreme Court precedent, the legislative history, and the record before this Court powerfully demonstrate the need for the nonfederal funds prohibition at the national political party committee level. As the Supreme Court observed in *Colorado II*, "[w]hat a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." *Colorado II*, 533 U.S. at 458. The Findings of Fact establish that there is "no wall between the national parties and the national government." Findings ¶ 1.47; *see also* Briffault at 651-52 (observing the web of relations linking major donors, party committees and elected officials) (quoted with approval in *Colorado II*, 533 U.S. at 462-63). As Congress recognized, given the blurring of the lines between federal officials and the national political party committees, the only way to address the problem with nonfederal funds was to prohibit the national committees from raising it. Findings ¶ 1.62.

As discussed, *supra*, federal officeholders hold positions of power in both the national political parties and the federal government. Briffault at 651 ("Under the current campaign finance system, however, the 'party-as-organization' and the 'party-in-government' are increasingly merged. Members of Congress constitute and control the CCCs [Congressional Campaign Committees] that play the leading role in providing party money and campaign services to congressional candidates. The President typically controls his party's national committee, and once a favorite has emerged for the presidential nomination of the other party, that candidate and his party's national committee typically work closely together. As a result, large donations to the party organization are effectively donations not just to specific candidates but to the party-in- government's leadership, who use that money to protect or expand their power in government, by spending in congressional races and the presidential election."). Indeed, officeholders and candidates who are successful fundraisers gain enhanced stature in Congress as a result of their

fundraising prowess. Findings ¶ 1.66 (statement of Senator Boren). In other words, it is often the case that those who are the best "soft money" fundraisers are the most influential government officials.

Given that the national political party committees and federal officeholders and candidates are "inextricably intertwined," Findings ¶ 1.62; *see also* ¶ 1.46, the national party ban is closely drawn. The record overwhelmingly demonstrates that large "soft money" donors are given access to special meetings with the President and key congressional leaders. *See, e.g., id.* ¶¶ 1.75.5, 1.77.10. Accordingly, Congress was justified in placing a complete ban on the national party committees raising nonfederal funds regardless of the ultimate use of those funds and regardless of who ultimately solicits them.

Finally, Plaintiffs contend that Section 323(a) sweeps too broadly because it will have "an immediate, debilitating, and long-lasting effect" on the national political party committees. RNC Br. at 55. I find this argument implausible. It bears emphasizing that the national political party committees have only been raising large sums of nonfederal funds in recent years. I do not take Plaintiffs to be actually arguing that prior to the explosive growth of nonfederal funds as a means of political party financing, political parties were somehow handicapped and unable to effectively communicate their message. The idea, therefore, that because political parties are now limited solely to federal funds they will be effectively silenced, is nonsensical based on the record developed in this case. *See* RNC Br. at 54 ("The net effects of BCRA will be massive layoffs and severe reduction of important core political speech at the RNC, and reduction of many state parties to a 'nominal' existence.").

As *Buckley* observed, "[t]he overall effect of [FECA's] contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of

persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Buckley*, 424 U.S. at 21-22. The same applies to Section 323(a), which will require the national committees of the political parties to raise funds from a greater number of persons. Moreover, BCRA raises the individual contribution limitation to national political parties to $25,000. Now each national political party committee is permitted to receive up to $15,000 from political action committees, 2 U.S.C. § 441a(a)(2)(B), and up to $25,000 from individuals, BCRA § 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(B). In addition, in comparing the federal funds raised by the political parties during the 1996 election cycle with the 2000 election cycle, the Findings of Fact demonstrate that the amount of federal funds raised has increased. Findings ¶ 1.4.2. Given that BCRA has *increased* the federal funds limits for the national committees the suggestion that the absence of nonfederal funds from the coffers of the national committees is going to create a "severe reduction of important core political speech," RNC Br. at 54, is simply not credible.

In sum, I am convinced that a ban on nonfederal funds raised by the national political party committees is closely drawn to match the sufficiently important governmental interests. Deference to Congress's judgment is warranted and appropriate for the contribution restriction in Section 323(a). Moreover, given the record established in this case and judicial precedent on the relationship of political parties and donors, I find that all of Plaintiffs' arguments for why Section 323(a) is not closely drawn are without merit.[174]

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[174] Given my conclusion that Section 323(a), in its entirety, is constitutional, I need not reach Judge Leon's discussion narrowing Section 323(a).

(ii) Section 323(b) is Closely Drawn

Recognizing that the nonfederal funds prohibition on the national party committees in Section 323(a) would be rendered entirely ineffective without some form of corresponding restrictions on state, local, and district party committees use of nonfederal funds-a sensible proposition given the evidence discussed above-Congress enacted Section 323(b). Consistent with Congress's recognition that some state party spending does exclusively affect state elections, Congress doubled the hard money limitations available for state party committees, BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D), and permitted state party committees to raise "Levin" funds to pay for Section 301(20)(A)(i) and (ii) activities, provided that certain conditions are met. BCRA § 101 (a); FECA § 323(b)(2)(A)-(C); 2 U.S.C. § 441i(b)(2)(A)-(C).

With Section 323(b), Congress struck a compromise between requiring state and local political parties to use federal funds on "Federal election activity" and leaving to state law the state political party financing of activities related to state and local elections. Indeed, as one of the Senate sponsors stated:

> [BCRA] represents a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity. At the same time, the bill does not attempt to regulate State and local party spending where this danger is not present, and where State and local parties engage in purely non-Federal activities. We will not succeed in closing the soft-money loophole unless we address the problem at the State and local level. We do this, however, while preserving the rights and abilities of our State and local parties to engage in truly local activity.

148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain).

The detailed evidence discussed *supra*, convincingly demonstrates that nonfederal funds are funneled to the state political parties by the national political parties or donors at the direction of the national political parties or federal officeholders and candidates, to be used to influence federal elections. The evidence also shows that these contributions are given with the intent and effect of influencing federal elections. In addition to the evidence *supra*, representatives of all four of the national party congressional committees agree that they transfer "federal and nonfederal funds to state and/or local party committees for voter identification, voter registration and get-out-the-vote efforts. These efforts have a significant effect on the election of federal candidates." Findings ¶¶ 1.28, 1.32; *see also id.* ¶ 1.31. These statements are corroborated by documentary evidence, *id.* ¶ 1.28.1, 1.32, as well as by expert Donald Green who finds that

> [t]he evidence from California, as well as from numerous opinion surveys and exit polls that demonstrate the powerful correlation between voting at the state and federal levels, shows quite clearly that a campaign that mobilizes residents of a highly Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices. A campaign need not mention federal candidates to have a direct effect on voting for such a candidate. That parties recognize this fact is apparent, for example, from the emphasis that the Democrats place on mobilizing and preventing ballot roll-off among African-Americans, whose solidly Democratic voting proclivities make them reliable supporters for office-holders at all levels. As a practical matter, generic campaign activity has a direct effect on federal elections.

Id. ¶ 1.28.2; *see also id.* ¶ 1.30. Therefore these efforts by the state political parties in states that hold their elections on the same day as federal elections, which the record shows are funded in part by the national political parties, *id.* ¶ 1.28.3,

1.43.1, 1.43.2.1, affect federal elections even if they are only intended to affect the state contests, *id.* ¶¶ 1.29, 1.33.

Congress clearly understood that political party committees are essentially one, large interdependent organism and that without legislation targeted at state and local parties, the new campaign finance law would permit easy evasion of the national party committee "soft money" ban. Congress was appropriately concerned that if Title I of BCRA policed only nonfederal donations at the national committee level, donors would simply make those same donations to the state and local "branches" of the national committees, which would then use those funds to influence federal elections. Congress would have accomplished little with a direct prohibition at the national political party level if there was no corresponding restriction on nonfederal funds at the state and local level, given the unitary nature of political parties. Section 323(b) is a key provision of Title I designed to prevent the nonfederal funds prohibition on the national parties in Section 323(a) from being rendered completely ineffective.

In drafting Section 323(b), Congress was aware that under the FEC's previous allocation regime, state and local party committees were permitted to spend a mix of federal and nonfederal funds on certain activities that directly influenced federal elections. Congress found, however, that these allocation rules permitted easy evasion of the federal contribution limitations because political parties at all levels were raising amounts, in many instances, far in excess of federal contribution limitations. Those monies, instead of going to fund a portion of nonfederal activity, were actually going to finance federal election activity. Therefore, for the national political parties, Congress required that they be exclusively financed with money raised according to federal law. With regard to the state and local political parties, Congress refined the allocation rules to require that state parties use exclusively federal funds when spending money

on "Federal election activity." Section 323(b), therefore, ensures that the state and local parties are no longer used as conduits for national party spending of nonfederal funds to aid federal election campaigns.

Section 323(b) accomplishes this goal by only limiting or, in some instances, completely prohibiting state, district, and local political party committees' use of nonfederal funds when it is spent on: (1) voter registration activity that occurs within 120 days of a regularly scheduled federal election; (2) voter identification, GOTV activity, or generic campaign activity *conducted in connection* with an election where a federal candidate appears on the ballot; (3) public communications that refer to a clearly identified candidate for federal office and that promotes or supports or attacks or opposes a candidate for that office; or (4) an employee who spends more than 25 percent of his or her time during a given month on activities in connection with a federal election. BCRA § 101(b); FECA § 301(20)(A)(i)-(iv); 2 U.S.C. § 431(20)(A)(i)-(iv). Plaintiffs argue that "BCRA has imposed a federally dictated clamp on the use of *all* state-regulated money." CDP/CRP Opp'n at 16 (emphasis in original); *see also* McConnell Br. at 40 (Section 323(b) regulates "activity that relates only to state and local elections and does not benefit federal candidates."); CDP/CRP Opp'n at 21 (Federal election activity "encompasses virtually all party activity"). Plaintiffs' statements are clearly inaccurate. The definition of "Federal election activity" and the corresponding restrictions on it in Section 323(b) are closely drawn to match the sufficiently important interests discussed above.[175]

[175] Throughout their briefing, Plaintiffs proffer various examples of what they claim are "Federal election activit[ies]," which they then use to demonstrate BCRA's unconstitutionality. Many of these examples, however, are not covered under BCRA. For example, the RNC suggests that the Republican Party of Ohio could not use nonfederal funds to pay for printing a mailing of a flyer that reads "Vote Republican; John Smith for Dogcatcher on November 6." RNC Br. at 27. First, the printing and mailing of the flyer would not be GOTV activity because it is not individualized. Also, it is not "generic campaign activity" because it mentions a specific state candidate. Additionally, because it only mentions a state candidate, it is not covered by Section 301(20)(A)(iii).

It is true, no doubt, that Section 323(b) affects activity that has an impact on both federal and state elections. However, this, in and of itself, does not instantly pose First Amendment difficulties because the corruption related to nonfederal funds inheres in the fundraising process where major nonfederal donations are provided in exchange for access to federal officeholders and candidates-a process facilitated by the political party apparatus at all levels. The record demonstrates that the state political parties were equal partners and complicit in helping the national political parties raise and spend nonfederal funds for federal election purposes. Recognizing, however, that not every activity in which a state political party engages in affects federal elections, Congress sensibly limited the reach of BCRA to "Federal election activities," which are those activities at the state and local party level that strongly benefit federal candidates.

Since 1970, Congress has regulated the state and local political parties in this manner by requiring them to pay for many of these "Federal election activities" with federal and nonfederal funds. Plaintiffs' never challenge the constitutionality of having to use allocation percentages when paying for Section 301(20)(A) activities. If, as Plaintiffs' apparently concede, it is consistent with the Constitution to regulate how this activity is paid for in the first instance, then it is difficult for Plaintiffs to offer any compelling First Amendment argument that Congress is unable to require these activities to be paid for solely with federal funds, particularly given the interests articulated in the foregoing section. Plaintiffs' real complaint is that they are unable to continue to use the allocation ratios to pay for Section

301(20)(A) activities as they have done since the late 1970s. However, given the record in this case, I conclude that Congress is entitled to modify the allocation ratios as it has done statutorily in Section 323(b). To reiterate, the Supreme Court instructs that courts should not "second guess a legislative determination as to the need for prophylactic measures where the corruption is the evil feared." *NRWC*, 459 U.S. at 210; *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("courts must accord substantial deference to the predictive judgments of Congress").

In 1987, Judge Thomas Flannery of the United States District Court for the District of Columbia required the FEC to implement regulations standardizing the allocation system. *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987). Judge Flannery observed that "it is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those [volunteer materials, voter registration, and GOTV activities,] be 'hard money' under the FECA." *Id.* In 1987, it was determined that the allocation regime was sufficient. At the time of BCRA's passage, however, Congress determined that the allocation system was ineffective at preventing nonfederal funds from influencing federal elections.

Congress concluded, on the basis of the evidence before it, that the problems related to nonfederal funds already existed at the state political party level and that, prospectively, a national political party "soft money" ban would be entirely ineffective at the national level without some corresponding regulations at the state and local political party level. I shall briefly turn to each of the determinants of "Federal election activity."

(1) Section 301(20)(A)(i) and (ii) Activities

With regard to Section 301(20)(A)(i) and (ii) activities, the Findings compellingly demonstrate that voter registration

activities, voter identification, GOTV activities, or generic campaign activity conducted in connection with an election where a federal candidate is on the ballot will have an influence on federal elections. As discussed *supra*, the record includes the testimony of the representatives of all four of the national party congressional committees that they transfer "federal and nonfederal funds to the state party committees for voter identification, voter registration and GOTV efforts." Findings ¶¶ 1.28, 1.32 (officials observing that "[t]hese efforts have a significant effect on the election of federal candidates"); *see also id.* ¶ 1.28.1, 1.32 (CDP touting impact it has on federal elections with voter registration, vote-by-mail, and get-out-the-vote efforts in a letter it sent to a contributor). Furthermore, it is clear that efforts to encourage a particular political party's partisans to the polls, will assist *all* of that party's candidates on the ballot, state, local and federal alike. Voter mobilization efforts are designed to get a particular political party's faithful to the polls for a particular election.

Moreover, the Levin Amendment provides further evidence that Congress sought to accommodate the interests of the state political party committees in drafting Section 323(b). Given that a majority of states hold their elections at the same time as federal elections, Congress recognized that Section 301(20)(A)(i) and (ii) activities would have a more dramatic effect on state and local elections than on other activities. As a result, Congress found it important to permit the state and local parties to supplement their federal funding with nonfederal funds raised pursuant to the Levin Amendment to pay for these activities. As long as the activity does not refer to a clearly identified candidate for federal office, the funds are not used for certain broadcast communications, and the funds are raised directly by the state or local political party according to the requirements of state law (in increments of $10,000 or less) the state political party committees can use Levin funds to pay for Section

301(20)(A)(i) and (ii) activities. When paying for activities with Levin funds, the FEC's allocation percentages apply to the expenditure.

As a result, the Levin Amendment essentially acts as a modified allocation system. Congress determined that Section 301(20)(A)(i) and (ii) activity would often have a significant effect on state elections, given that most states hold elections at the same time as the federal government. By permitting the state and local parties to raise and spend "Levin funds," Congress allowed state and local political parties to continue to raise funds not subject to FECA *in a way that would not jeopardize the rest of the nonfederal money restrictions in Title I*. It can hardly be argued that a $10,000 donation to a state political party committee poses a threat of corruption when the federal limit on individual giving to state parties is also $10,000, BCRA § 102; FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(D), the limit to national parties is $25,000, BCRA § 307(a)(2); FECA § 315(a)(1); 2 U.S.C. § 441a(a)(1)(B), and the total cap on individual contributions is $95,000 per two-year election cycle, of which $37,500 may be contributed to candidates. BCRA § 307(b); FECA § 315(a)(3); 2 U.S.C. § 441a(a)(3). In other words, even though the Levin Amendment permits some nonfederal money into the political party system, it does so in a way that will not create a new loophole and also serves to accommodate state interests regarding their elections.

Because it was Congress's desire to prevent a new loophole from emerging, when it enacted the Levin Amendment, Congress prohibited transfers among or joint fundraising by state and local political parties with respect to "Levin funds." BCRA § 101, FECA § 323(b)(B)(iv), (C); 2 U.S.C. § § 441i(b)(2)(B)(iv), (C). I am not persuaded by Plaintiffs' arguments that these provisions are not closely

drawn. McConnell Br. at 40; CDP/CRP Br. at 36-39.[176] As stated by Defendant-Intervenors, "[w]ere state and local parties free to transfer $10,000 contributions among themselves, contributors could multiply the amount of their permissible contribution to a particular party simply by funneling additional soft money through other party committees." Def.-Int. Br. at 63 n.228. By way of example, a donor attempting to gain influence with a candidate in one congressional district could make ten $10,000 contributions to ten local parties, on the understanding that the entire $100,000 would be transferred to the one party that was engaged in "Federal election activities" in that candidate's district. Def.-Int. Opp'n at 34. Of course, state and local political parties remain free jointly to raise or transfer as much nonfederal funds as they desire to pay for activities that are not considered "Federal election activity," subject only to state restrictions.

With the Levin Amendment, Congress determined that state and local political party committees should be permitted to spend limited amounts of nonfederal funds on certain "Federal election activities." Enacting this provision further demonstrates that Congress made a significant effort to tailor

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[176] I am also not persuaded by the doomsday scenario described by the CRP and CDP regarding the effect BCRA will have on their fundraising. Findings ¶¶ 1.98-1.99.1 (also describing their fundraising and spending generally). Their estimations of BCRA's impact on their fundraising efforts are not based on any formal analysis, but instead on an application of BCRA to past fundraising efforts which is explained in an imprecise manner that leaves as many questions as it answers. *Id.* ¶ 1.98. It is unrealistic to think that the state political parties will fundraise in exactly the same fashion under the BCRA regime as they did under FECA. Furthermore, Plaintiffs' own expert Raymond La Raja believes that BCRA will not affect some state parties' fundraising efforts at all, and while others may be affected, "[o]ne thing we can be sure of is that parties will figure out the ground rules and they will find an important role for themselves within the new campaign finance regime. *Id.*

the nonfederal money restrictions at the state party level. Given that the provision must only be "closely drawn," I find that Congress's restrictions on Section 301(20)(A)(i) and (ii) activities are constitutional.[177]

(2) Section 301(20)(A)(iii) Activity

Turning to Section 301(20)(A)(iii)-a public communication that supports or opposes a clearly identified federal candidate-I likewise find this provision constitutional under the First Amendment. In Judge Leon's opinion, he explains why Congress' decision to restrict state and local party organizations to funding Section 301(20)(A)(iii) activities with federal funds is closely drawn to match a sufficiently

[177] In doing so, I am also not persuaded by Plaintiffs' arguments that some of the provisions in Section 301(20)(A)(i) and (ii) are vague; particularly "get-out-the-vote activity." *See, e.g.*, CDP/CRP Br. at 33. First, I am not persuaded that a reasonable person would have difficulty understanding what is meant by these terms, and the fact that these provisions apply to political actors only strengthens my conviction. Second, the FEC has promulgated implementing regulations related to "Federal election activity." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed.Reg. 49,064, 49,083 (July 29, 2002). In my judgment, these regulations may mollify any constitutional uncertainties related to these terms. *See Martin Tractor Co. v. FEC*, 627 F.2d 375, 384-387 (D.C.Cir.1980), *cert. denied sub nom. Nat'l Chamber Alliance for Politics v. FEC*, 449 U.S. 954 (1980). In *Martin Tractor*, the Court of Appeals determined that the advisory opinion process and the uncertainty of plaintiffs' legal rights counseled against premature constitutional adjudication because the "adversarial posture assumed by the parties and contours of their dispute," *id.* at 387, lacked clarity, unlike other cases that had found ripeness in similar circumstances. Moreover, the fact the FEC "has said or done nothing ... to indicate how it construes the term 'solicit,' 'left the court "without substantial guidance to decide this case or even to frame the constitutional issues at stake." *Id.* at 387. Finally, Plaintiffs have not spent much time briefing this issue, and I am therefore chary to strike these provisions down without waiting to see if the FEC's regulations ameliorate Plaintiffs' vagueness concerns. In the interim, an Advisory Opinion process stands by to prevent any potential chill that might be incurred by Plaintiffs.

important interest. I agree with his analysis and concur with him that Section 323(b) is constitutional in restricting the state and local party committees to spending federal funds on Section 301(20)(A)(iii) activities. I would additionally point out that I am particularly persuaded by Judge Leon's discussion of the fact that Section 301(20)(A)(iii) is a restriction on a contribution (as opposed to an expenditure). To the extent that Judge Leon's opinion on this point is inconsistent with anything that I have discussed in my own opinion-for example, my view of *Buckley*'s definition of corruption or my view of what constitutes pure issue advocacy-I do not join those portions of Judge Leon's discussion.[178]

(3) Section 301(20)(A)(iv) Activity

Finally, with regard to Section 301(20)(A)(iv) activity-requiring state and local parties to use federal funds to pay the salary of an employee who spends more than 25 percent of his or her compensated time in a month in connection with a Federal election-I find that none of the Plaintiffs have articulated a specific reason for striking the provision down. In other words, Plaintiffs do not provide any specific argument as to why that provision is unconstitutional. Given the paucity of specific briefing on this provision (Defendants have also not spent any time addressing this specific provision), I would not hold Section 301(20)(A)(iv) facially unconstitutional.

(4) Conclusion

I find that Section 323(b) is closely drawn to match the sufficiently important governmental interests at stake in this case. Congress was appropriately concerned, as the record in this case tellingly indicates, that a prohibition on nonfederal funds at the national level would be entirely ineffective

[178] This statement applies with equal force to any of the portions of my colleagues' opinions in which I am concurring.

without corresponding restrictions on the state and local party committees. Section 323(b) is a closely drawn answer to that problem that continues to permit State and local parties to raise as much nonfederal funds as they are able to raise, consistent with state law, to be spent on activity that solely affects state elections.

(iii) Section 323(c)

This provision is not specifically challenged by any Plaintiff. As such, I do not pass on its constitutionality.

(iv) Section 323(d) is Closely Drawn

Section 323(d) is a measure intended to prevent political parties from using tax-exempt groups as a means of evading FECA's source, amount, allocation, and disclosure requirements. BCRA § 101; FECA § 323(d); 2 U.S.C. § 441i(d). Section 323(d) accomplishes this goal by prohibiting any political party committee or its agents from "solicit[ing]" funds for or "mak[ing] or direct[ing]" any donations to either: (i) any tax-exempt section 501 organization, *see* 26 U.S.C. § 501(c), that spends any money "in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)"; or (ii) any section 527 organization, *see* 26 U.S.C. § 527, (other thana state or local party or the authorized campaign committee of a candidate for state or local office). BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § § 441i(d).

As discussed above, the record clearly indicates that prior to BCRA, the political parties used tax-exempt organizations as a means of evading FECA's requirements. Congress was appropriately concerned that without restrictions on party solicitation and party direction of federal and nonfederal money to tax-exempt interest groups, party committees would continue to use satellite party organizations disguised as tax-exempt groups to continue to circumvent FECA and also help the parties circumvent the new contribution requirements in

BCRA. Seen from this perspective, Section 323(d) is a reasonable, prophylactic measure to which this three-judge District Court owes deference. *NRWC*, 459 U.S. at 210.

Section 323(d) is closely drawn because it only applies to Section 501(c) organizations that "make[] expenditures or disbursements in connection with an election for *Federal office* (including expenditures or disbursements for Federal election activity)," BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § 441i(d)(1) (emphasis added), and Section 527 organizations, which by definition have been given tax-exempt status because they engage in political activity.[179] BCRA § 101; FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2). Section 323(d), therefore, focuses only on those non-profit organizations that have posed a threat to the stability of the campaign finance regime. Parties continue to be permitted to contribute to any 501(c) organization that does not engage in "Federal election activity," BCRA § 101; FECA § 323(d)(1); 2 U.S.C. § 441i(d)(1), and are free to contribute federal funds to PACs formed by tax- exempt organizations that do engage in "Federal election activities," BCRA § 101; FECA § 323(d)(2); 2 U.S.C. § 441i(d)(2).

Despite this tailoring, Plaintiffs make a number of arguments that exaggerate the reach of Section 323(d). For example, the CDP Plaintiffs contend that Section 323(d)

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[179] Section 527 of the tax code defines a "political organization" as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). An "exempt function" is defined as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed." 26 U.S.C. § 527(e)(2).

"prohibits the parties from participating in ballot measure campaigns." CDP/CRP Br. at 44. This statement is incorrect as state political parties are not in any way prohibited by BCRA from making direct expenditures to support or oppose ballot measures. BCRA does prohibit the state and local committees from soliciting donations on behalf of and directing any donations to an organization that engages in "Federal election activity." To the extent that ballot measure organizations, which the CDP Plaintiffs argue are "typically" Section 501(c)(4) organizations, engage in "Federal election activity," BCRA prohibits the political party committees at all levels from directing monetary contributions to those organizations.

There is no question that ballot measure organizations often engage in GOTV activity in and around federal elections. Indeed, the CDP should understand this fact. On October 19, 1999, Judge Garland E. Burrell, Jr. of the Eastern District of California ordered summary judgment for the Commission against the CDP because the CDP had contributed $719,000 in nonfederal funds to "Taxpayers Against Deception-No On 165," a tax-exempt California political committee opposed to a state spending referendum. *FEC v. CDP*, No. S-97-0891 (E.D. Cal. Oct. 14, 1999) (order granting summary judgment) at 2. None of the CDP's donations were reported to the FEC, *id.* at 7-8, and all but $2,000 of the money contributed by the CDP was knowingly used for partisan voter registration. *Id.* at 2, 13. The ballot committee persuaded the CDP to donate $719,000 to its organization because it promised to target potential registrants that would be predisposed to vote for Democrats based on historic voting patterns. *Id.* at 4. The district court in that case found that on the basis of this conduct, the CDP had "violated the FECA and the allocation rules by funding a generic voter drive that targeted Democrats." *Id.* at 15. Accordingly, contrary to the CDP's contention, ballot measure committees can not only help a party committee

avoid disclosure requirements, but they can also help party committees avoid the allocation system. In other words, in the *FEC v. CDP* case, the $719,000 in nonfederal funds transferred to the ballot committee for voter registration did not have to be allocated between federal and nonfederal accounts, as the CDP would have had to do if it had engaged in the same spending. *See also* Findings ¶ 1.85.6.

The CDP Plaintiffs also make the argument that a party official could violate the law "simply for contributing to his or her church, if the church has engaged in non-partisan activities encouraging (or assisting) its members to vote." CDP/CRP Br. at 46. This statement is incorrect. Section 323(d) only prohibits actions by party officials "on behalf of" the party committee. BCRA § 101; FECA § 323(d); 2 U.S.C. 441i(d). A party official's personal donation of his or her own money to a church, like other donations or solicitations made by party officials individually on their own behalf, are simply not covered under Section 323(d).

Section 323(d) applies to the party committees soliciting and directing federal and nonfederal funds to these tax-exempt organizations. The evidence in this case and the record before Congress demonstrates congressional concern with the role of tax-exempt organizations in circum venting FECA's contribution restrictions. *See* Findings ¶ ¶ 1.85-1.86. As discussed earlier, the record in this case establishes that prior to BCRA, parties and candidates would solicit and donate funds to tax-exempt organizations which would then be used to influence federal elections on behalf of the party or candidate donor. The legal advantage to employing a tax-exempt organization is that it avoids the source, amount, disclosure, and allocation system of the FECA regime. Therefore, Congress recognized that continuing to permit parties to solicit and direct federal funds to these tax-exempt organizations logically posed a circumvention problem. Notably with BCRA, Congress does permit political party

committees to solicit and direct federal funds to PACs, which are regulated under FECA and required to make disclosures and to accept only federal funds. Tax-exempt organizations can establish political committees under the Act to which political parties can direct funds or solicit donations to the PAC.

As the foregoing discussion indicates, I find that Congress acted prophylactically and on the basis of a compelling record to ensure that tax- exempt organizations would not undermine the Title I's restrictions on nonfederal funds. As such, and on the basis of the record before me, I determine that Section 323(d) is closely drawn and facially constitutional.

(v) Section 323(e) is Closely Drawn

I concur with Judge Henderson's conclusion that Section 323(e) is constitutional under the First Amendment, albeit on slightly different grounds. Given my conclusion regarding the definition of Federal election activity, I do not find it necessary to narrowly construe the provision.

As discussed at length, political parties dangle access to federal candidates as bait to lure large nonfederal money donors. In response to this obvious problem, Congress enacted Section 323(e), which prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending any nonfederal funds in connection with a federal election. BCRA § 101; FECA § 323(e)(1)(A); 2 U.S.C. § 441i(e)(1)(A). The statute permits federal candidates or officeholders to raise nonfederal funds in connection with a state and local election, provided that those funds do not exceed the federal contribution limitations and are from sources permitted under federal law. BCRA § 101; FECA § 323(e)(1)(B)(i) and (ii); 2 U.S.C. § 441i(e)(1)(B)(i) and (ii). Notably, a federal officeholder or candidate "may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party."

BCRA § 101; FECA § 323(e)(3); 2 U.S.C. § 441b(e)(3). Also, federal candidates and officeholders may solicit money on behalf of any tax-exempt Section 501(c) organization whose "principal purpose" is not 301(20)(A)(i) or (ii) activity, so long as the solicitation does not specify how the funds will be spent. BCRA § 101; FECA § 323(e)(4)(A); 2 U.S.C. § 441i(e)(4)(A). Concomitantly, a federal candidate is permitted to raise money for a tax-exempt Section 501(c) organization that does engage in Section 301(20)(A)(i) and(ii) activity, subject to the condition that he or she may solicit up to $20,000 per person per year from individuals only. BCRA § 101; FECA § 323(e)(4)(B)(i) and (ii); 2 U.S.C. § 441i(e)(4)(B)(i) and (ii).

BCRA is closely drawn because it permits federal candidates and officeholders to continue to engage and fully participate in the political process, but closely circumscribes their activities to prevent the kinds of problems that developed with their solicitation of nonfederal funds. For example, under BCRA, a federal officeholder may raise up to $2,000 from an individual for use in a state election, but may not raise money from a corporation for that purpose. However, to avoid undermining traditional political activity, BCRA permits federal candidates and officeholders to appear and speak at state and local party events. *Cf.* Findings ¶¶ 1.97, 1.96. Accordingly, Plaintiffs are simply wrong to claim that, under BCRA, "aside from speaking at and attending fundraising events, federal officeholders and candidates will otherwise be prohibited altogether from raising money directly for state and local candidates." McConnell Br. at 23-24. Rather, BCRA permits federal officeholders and candidates to raise nonfederal funds for state candidates, provided that they are within the federal source and amount limitations.

In my judgment, Defendants have adequately explained why Section 323(e) permits federal officeholders and

candidates to make certain solicitations for tax-exempt organizations and why political parties and party officials under Section 323(d) are prohibited from making the same solicitation. *See* RNC Br. at 46 (arguing the "[t]hese provisions subjecting political parties to flat bans while permitting federal candidates and officeholders to engage in the same activities reveal an utter lack of tailoring in the Act's treatment of parties."). The reason for the difference is that unlike political party officials, candidates are subject to limits on solicitation at all times, not whether or not they are acting on behalf of the party. As Defendants suggest, "it was reasonable for Congress to allow candidates to make solicitations under limited circumstances that accommodate the legitimate interests of candidates in providing personal support for certain organizations, while retaining the monetary limits that help minimize the risk of corruption." Gov't Opp'n at 39. Plaintiffs' offer no real response to this in their filings.

As Judge Henderson has observed in regard to Section 323(e) in her opinion, "[i]t bears emphasizing that the plaintiffs do not challenge this provision with the same vigor as they do BCRA's other non-federal fund restrictions." Henderson Op. at 323. Given that Plaintiffs have spent little time engaging in a discussion of these issues and the fact that the record before this three- judge District Court amply supports the congressional decision to regulate federal candidates in this manner, I find that under *Buckley*'s scrutiny applicable to contribution restrictions, Section 323(e) is closely drawn and, therefore, consistent with the First Amendment.

(vi) Section 323(f) is Closely Drawn

For the reasons set forth in Judge Leon's opinion, I similarly find Section 323(f) closely drawn to match the sufficiently important governmental interests discussed above.

(c) *Conclusion*

In my judgment, Title I is a closely drawn contribution restriction targeted at reducing the corrosive influence of nonfederal funds on federal elections. As Justice Byron White remarked in *Citizens Against Rent Control:* "Every form of regulation-from taxes to compulsory bargaining-has some effect on the ability of individuals and corporations to engage in expressive activity. We must therefore focus on the extent to which expressive and associational activity is restricted by [the law at issue]." *Citizens Against Rent Control,* 454 U.S. at 310 (White, J., dissenting). Taking a comprehensive view of Title I, as I have done in my discussion above, I conclude that any infringement on First Amendment protections is more than outweighed by the significant state interests behind regulating nonfederal funds. Accordingly, I find Title I consistent with the First Amendment guarantees of speech and association and the ruling in *Buckley.*

C. *Plaintiffs' Equal Protection and Underbreadth Claims*

Plaintiffs contend that Title I is also unconstitutional because it violates the Fifth Amendment by restricting the activities of political parties without imposing similar restrictions on special interest groups. *See, e.g.,* McConnell Br. at 40-43; RNC Br. at 57. As a corollary to this argument, Plaintiffs contend that in treating political parties differently from special interest organizations, Title I is fatally under inclusive because it "does not begin to address the supposed access enjoyed by hard-money donors to political parties or by special interest groups." RNC Br. at 65. Since I find Title I consistent with the First Amendment guarantees of speech and association, I am required to reach Plaintiffs' arguments on these points. After considering the parties' arguments and the relevant caselaw, I find Plaintiffs' contentions on these points to be without merit.

Assuming that Plaintiffs' equal protection arguments are even viable after my discussion of Plaintiffs' First Amendment issues, *see* 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law-Substance & Procedure* § 18.40 (3d ed. 1999), I find their arguments unpersuasive.[180] It is a well-worn tenet of equal protection analysis "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). It is well understood, therefore, that the "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (internal citation and quotation marks omitted). In this case, the record and prior precedent demonstrate that political parties are not "similarly situated" to special interest organizations. The law does not treat political parties "better or worse" than special interest organizations. It only treats them differently because they have different interests that need to be accommodated,

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[180] As Professors Rotunda and Nowak discuss:

> It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights. Laws which classify persons in their exercise of these rights will have to meet strict tests for constitutionality without need to resort to the equal protection clause. Should the laws survive substantive review under the specific guarantees they are also likely to be upheld under an equal protection analysis, for they have already been found to represent the promotion of government values which override the individual interest in exercising the specific right .... If the Court examines the classification under the First Amendment and finds that the classification does not violate any First Amendment right, the Court is unlikely to invalidate that classification under equal protection principles.

3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law- Substance & Procedure* § 18.40 (3d ed.1999).

and they have a different role in the campaign system and in the government than do special interest organizations.

The record in this case establishes the unique situation of political parties in the political process. As Plaintiffs' expert La Raja concludes, "[m]ost interest groups, in contrast [to political parties], seek to build relationships with officeholders as a way of improving access to the legislative process and lobbying their position .... Political parties ... allocate resources for electoral strategies, meaning they contribute money to a party candidate who is in a potentially close election." Findings ¶ 1.16.2; *see also id.* ¶ 1.46 (discussing the special relationship between political parties and their candidates/officeholders). Furthermore, an RNC official agrees that interest groups can never replace political parties. *Id.* ¶ 1.89. As Senator McCain testifies,"[t]he entire function and history of political parties in our system is to get their candidates elected, and that is particularly true after the primary campaign has ended and the party's candidate has been selected." *Id.* ¶ 1.48. In fact, FECA recognizes this difference when it defines a political party as "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C 431(16). Interest groups are simply not connected to candidates in the same manner. *See Colorado II*, 533 U.S. at 449 ("[t]here is no question about the closeness of candidates to parties").

It is therefore the case that BCRA treats political parties differently than special interest organizations. For example, political parties are permitted to receive greater contributions from individuals than are interest groups. *Compare* BCRA § 307(a); FECA § 315(a)(1)(B); 2 U.S.C. § 441a(a)(1)(B) *with* 2 U.S.C. § 441a(1)(C). The political parties are permitted to make greater coordinated expenditures in support of federal candidates than special interest

organizations. 2 U.S.C. § 441a(d). Moreover, the national political parties and the national Senate committees may make greater contributions to Senate candidates than special interest groups. BCRA § 307(c); FECA § 315(h); 2 U.S.C. § 441a(h). Finally, BCRA permits national political parties to transfer federal money (in any amount) to other party committees without being subject to the contribution limits that apply to such transfers by nonparty committees. 2 U.S.C. § 441a(a)(4). At the same time, special interest organizations set up as nonprofit corporations, will have to comply with the electioneering communication provisions in Title II. *See supra*. BCRA presents a symmetrical approach to the problems plaguing the campaign finance system: national political party fundraising of nonfederal funds and interest organizations using general treasury funds to influence a federal election. The law simply recognizes the unique nature of these organizations in the political process and accommodates them in different ways. *Cf. California Med. Ass'n*, 453 U.S. at 201 ("The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process."). Accordingly, I find that Title I does not violate the Fifth Amendment guarantees of equal protection.

As a corollary of their Fifth Amendment arguments, Plaintiffs also contend that Title I is underinclusive because it does not subject interest groups to the same restrictions on nonfederal money applicable to political party committees. McConnell Br. at 41-43; RNC Br. at 57-58, 65. As the Court of Appeals has held, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict *more* speech or the speech of *more* people, could be more effective. The First Amendment does

not require the government to curtail as much speech as may conceivably serve its goals." *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995) (emphasis in original). As "the primary purpose of underinclusiveness analysis is simply to 'ensure that the proffered state interest actually underlies the law,' *Austin*, 494 U.S. at 677 (Brennan, J., concurring), a rule is struck for underinclusiveness only if it cannot 'fairly be said to advance any genuinely substantial governmental interest,' *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984)." *Id.* As I have shown above, the record in this case significantly demonstrates that Title I is carefully tailored to address the problem that was before Congress-nonfederal funds raised by the national committees of the political parties. The rationale underlying Title I simply does not apply with equal force to entities not covered by Title I. Accordingly, an underinclusive challenge is without merit.

I also agree with Defendants when they state that Plaintiffs make a policy argument better suited for the legislature than the judiciary when Plaintiffs argue that "Title I's differential treatment of parties and special interest groups will make matters worse, not better." RNC Br. at 67 (capitalization altered).[181] Def. Opp'n at 52; *Cf. Colorado II*, 533 US. at 454 n.15 ("[Wle do not mean to take a position on the wisdom of policies that promote one source of campaign funding or another."). The problem that Congress sought to solve related

[181] As part of this argument, Plaintiffs present evidence attempting to show that under BCRA, interest group activity will escalate and supplant those activities traditionally done by political parties. Findings ¶¶ 1.87-1.88, 1.91-1.93. This change would be a negative development, Plaintiffs attempt to show, because interest groups do not operate as transparently as political parties. *Id.* ¶¶ 1.90, 1.91. A review of the facts leads to the conclusion that none of them sheds much light on what BCRA's impact will be on the activities of interest groups. *Id.* ¶ 1.95. Furthermore, the evidence regarding the lack of disclosure required of interest group political activity does not take into account BCRA's new disclosure requirements. *Id.*

to the fundraising abuses and access given to large nonfederal money contributors to political parties. Title I accomplishes this goal in a narrowly tailored fashion.

Moreover, the evidence in the record is at best inconclusive as to whether nonfederal funds will suddenly flow to special interest groups. While there is some evidence in the record that interest groups are expected to receive nonfederal funds donations, there is equal evidence in the record that nonfederal funds will not flow to special interest groups since these groups cannot deliver "the special favors that only a political party can deliver by dint of its ubiquitous role in all levels of government." Findings ¶ 1.87.[182] As the Findings demonstrate, the experts are divided on this question. Accordingly, it is the choice of Congress as to whether it should refrain from offering legislation at this time directed at special interest organizations. If special interest groups create problems of corruption worthy of congressional attention, that is always the prerogative of Congress; but such an amendment to campaign finance laws would require a compelling record- a record not present here. *Cf. NRWC*, 459 U.S. at 209 ("This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.") (internal quotation marks and citations omitted). Accordingly, in my judgment, Plaintiffs' underbreadth challenge fails.

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[182] Plaintiffs also cite to a series of newspaper articles for the fact that interest groups are now "*gearing up* "to supplant political party committees with respect to nonfederal fundraising. McConnell Br. at 42 (emphasis added). This evidence is highly speculative and since it would not form a basis for congressional action in the first instance, I am not persuaded that Congress needed to grapple with this problem; particularly when expert evidence is largely divided over whether special interest groups will even supplant political party committees in nonfederal funds fundraising.

D. *Plaintiffs' Federalism Challenge*

My colleagues, with two exceptions, do not specifically address Plaintiffs' claims that Title I violates Article I, Section 4, and the Tenth Amendment of the Constitution by "usurping the right of states to regulate their own elections." McConnell Br. at 9 (capitalization altered).[183] Given that I find Title I constitutional in keeping with *Buckley* and the First Amendment, I am also required to reach Plaintiffs' federalism arguments. However, after serious reflection, particularly in regard to the parties' answers to my questions at oral argument, I do not find that any of the Plaintiffs before this three-judge panel have standing to raise a Tenth Amendment challenge to Title I.[184]

It is true that standing for private parties challenging acts of Congress has been found when a plaintiff asserts that Congress has acted in excess of its Article I powers. Most of these cases have focused on situations where Congress plainly exceeded its power under the Commerce Clause and the statutes were declared unconstitutional. *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free

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[183] Judge Henderson rejects Plaintiffs' federalism challenge to Section 323(e). Henderson Op. Part IV.D.4, while Judge Leon rejects Plaintiffs' federalism challenge with regard to Section 301(20)(A)(iii) activities. Leon Op. Part I.B.2. Neither of my colleagues, however, address the question of whether Plaintiffs have standing to present his argument.

[184] When I refer to standing in this context, I am specifically referring to rules of prudential standing which act as self-imposed limitations on the jurisdiction of Article III courts. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982) ("Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that 'the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' *Warth v. Seldin*, 422 U.S. [490, 499 (1975)]."). It is my view, therefore, that Plaintiffs lack "third-party standing" to assert the constitutional rights of the States.

School Zones Act, making it a federal offense for any individual knowingly to possess a firearm at a place that an individual knows or has reasonable cause to believe is school zone, exceeded Congress's commerce clause authority); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact civil remedy provision of Violence Against Women Act). On the other hand, courts have been reluctant to provide private parties with standing when they are asserting the rights of a State. *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 144 (1939) ("As we have seen there is no objection to the Authority's operations by the states, and, if this were not so, the appellants, absent the states or their officers, *have no standing in this suit to raise any question under the amendment.*") (emphasis added); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 761 (10th Cir. 1980) ("Only the State has standing to press claims aimed at protecting its sovereign powers under the Tenth Amendment.").

In *New York v. United States*, the Supreme Court articulated this distinction in the context of a *State* bringing suit:

> In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution *See, e.g., Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. *See, e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869). *In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the*

> *States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. See United States v. Oregon*, 366 U.S. 643, 649 (1961); *Case v. Bowles*, 327 U.S. 92, 102 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941).

New York v. United States, 505 U.S. 144, 155-56 (1992) (emphasis in original). In the context of a State bringing suit, the Supreme Court concluded that the distinction was practically irrelevant. *Id.* at 159 ("In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment."). The Supreme Court has not, however, addressed whether this distinction is of no practical difference when a private party challenges a law of Congress and indirectly asserts the Tenth Amendment as a basis for finding the law unconstitutional. Indeed, given *Lopez* and *TVA*, it would appear that this distinction is relevant when someone other than the State or the State's officials are bringing the challenge.

This distinction is the reason Plaintiffs claim at places in their briefing that their federalism challenge involves the argument that Congress lacks the affirmative power to have enacted BCRA under the Elections Clause. *See, e.g.*, McConnell Reply at 4 n.2 ("[P]rivate parties are routinely allowed to bring suit where they are claiming that Congress acted *outside* its delegated powers, rather than merely asserting that Congress violated state sovereignty in acting *under* its delegated powers.") (emphasis in original) (citing *Lopez*). Despite what Plaintiffs state, their briefing shifts between these two poles and is often not clear as to whether they are making a "Tenth Amendment" argument that

Congress is transgressing "the province of state authority reserved by the Tenth Amendment," *New York*, 505 U.S. at 155, or are simply arguing that Congress had exceeded its delegated authority, *id. See, e.g.*, CDP/CRP Br. at 21 ("In this case, plaintiffs' [sic] believe that the two inquiries [identified in *New York*] do indeed converge, but that under either inquiry, BCRA oversteps the boundary between federal and state authority.") (internal citation and quotation marks omitted).

The ease with which Plaintiffs move between these two arguments is problematic. If it is the case that Plaintiffs are making a Tenth Amendment argument that Congress, in enacting BCRA, was transgressing the province of state authority reserved by the Tenth Amendment, then *TVA* holds that Plaintiffs do not have standing to bring such a challenge.[185] However if, Plaintiffs are arguing that Congress lacks the affirmative authority to enact Title I, then presumably *Lopez* and that line of cases recognizes private parties do have standing to assert such a challenge at least in the context of the Commerce Clause.

In order to make an argument that Congress has acted *outside* its power under the Elections Clause in enacting Title I of BCRA, Plaintiffs are forced to contend that Congress is intruding on the ability of *States* to regulate their own

[185] I would observe, that the D.C. Circuit in the *Lomont* case recently discussed the issue of private party standing under the Tenth Amendment in a footnote. *Lomont v. O'Neill*, 285 F.3d 9, 13 n.3 (D.C.Cir.2002). While the D.C. Circuit did not rule on this issue, it certainly hinted that the Supreme Court should be the tribunal to overrule *TVA* and not the lower courts. Accordingly, to the extent Plaintiffs are claiming that they fit into the latter category of cases, I find that *Lomont* cautions against this three-judge panel finding standing. *See City of Roseville v. Norton*, 219 F.Supp.2d 130, 148 (D.D.C.2002) ("This Court is bound to apply Circuit precedent. *Lomont* implicitly recognizes that the Seventh Circuit's reasoning in *Gillespie* [a case finding private party standing under the Tenth Amendment] cannot be squared with *TVA* 's holding.").

elections. *See, e.g.*, McConnell Br. at 9 ("For the first time in the relatively short history of campaign finance regulation, Congress has enacted legislation that systematically restricts political activity not only in federal elections, but also in state and local elections. *This massive intrusion into a core area of state sovereignty-the ability of States to regulate their own elections*-violates basic principles of federalism.") (emphasis added). To the Plaintiffs in these consolidated cases, therefore, BCRA violates state sovereignty and the focus of their arguments are on the injury to the States.

This result is different from the Supreme Court striking down a law in the Commerce Clause context, like *Lopez*, where the argument is that the legislature focused on a problem unrelated to interstate commerce. *Lopez*, 514 U.S. at 567 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."). However, given the nature of Title I, and the Elections Clause, Plaintiffs are really contending that Congress was not simply regulating federal elections, *but was impermissibly legislating state elections*. *See, e.g.*, McConnell Br. at 17 ("By imposing federal limits on these activities, BCRA effectively overrides the laws of numerous States . . . ."). The injury in this context is not held by an individual plaintiff, but rather the injury is only held by the State, who organizes the elections pursuant to state law. Since Title I operates as a contribution restriction, the injury to the Plaintiffs in this case rests on an interference with funds specifically regulated or not regulated by their individual States. Premising a Tenth Amendment argument based on the Elections Clause, in the context of BCRA, therefore compels Plaintiffs to present an argument that specifically rests on the

rights of their individual States, who have chosen to regulate or not regulate these funds.[186]

At oral argument, CDP Plaintiffs' counsel had difficulty explaining this nuanced difference in relation to their legal positions. *See* Tr. at 29-30. RNC Plaintiffs' counsel proffered that under *Oregon v. Mitchell*, Plaintiffs had standing because the Supreme Court decided that case based on "Congress's overreach." Tr. at 43. In *Oregon v. Mitchell*, the Court considered, *inter alia*, amendments to the Voting Rights Act that would have given 18 year-olds the right to vote. The Court upheld the amendments as applied to federal elections, but struck them down as applied to state and local elections. *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (opinion of Black, J.). Justice Black, in striking down that portion of the Act that applied to state elections, stated that "[n]o function is more essential to the separate and independent existence of the *States and their governments* than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id.* at 125 (emphasis added); *see also id.* at 124-25 (observing that "the Framers of the Constitution intended the *States* to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections") (emphasis added).

It is correct that *Mitchell* found that Congress had acted in excess of its statutory authority, but *Mitchell* involved an *original* action in the Supreme Court brought by a number of *States* who resisted compliance with the Voting Rights Act. *Id.* at 117; *see also id.* at 117 n.1 ("No question has been raised concerning the standing of the parties or the

[186] In another context, therefore, Plaintiffs might have private party standing to assert that Congress exceeded its authority under the Elections Clause. However, in the context of BCRA, the parties are actually asserting the rights of their individual States in this litigation.

jurisdiction of this Court."). Accordingly, in *Mitchell*, there was no question that the plaintiffs in that case were able to argue that Congress exceeded its power under the Elections Clause because the plaintiffs in that action were either the States themselves or the United States, who had each invoked the original jurisdiction of the Supreme Court of the United States. The question in this case is whether a private party can assert that right on behalf of the State. As no States are among the 77 plaintiffs to this case, and as none of the Plaintiffs bring suit as representatives of the States, I find that Plaintiffs' Tenth Amendment challenge to Title I is nonjusticiable.

The issue of third-party standing is particularly weighty in this case, where for example, the State of Kentucky has joined an *amicus* brief in support of BCRA, while Plaintiff Mitch McConnell, who represents Kentucky in the Senate, is a lead Plaintiff challenging BCRA. Moreover, this situation represents a question that the Supreme Court has not definitively addressed. *See Pierce County v. Guillen*, 123 S. Ct. 720, 732 n.10 (2003) ("[I]n light of our disposition . . . , we need not address the second question on which we granted certiorari: whether private plaintiffs have standing to assert 'states' rights' under the Tenth Amendment where their States' legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question.").[187]

[187] Beside Kentucky, 18 States, the Commonwealth of Puerto Rico, and the Territory of the United States Virgin Islands support BCRA, although they take no position on the standing issue. *See* Am. and Substituted Br. of *Amici Curiae*-The States of Iowa and Vermont *et al.*; Utah and seven other states oppose BCRA and do not address the standing issue. Br. of *Amici Curiae* Utah, *et al.* The Utah *Amici* point out in a footnote that Alabama did not join the *amici* brief because Alabama's Attorney General William Pryor was a named Plaintiff in the *McConnell* action. *Id.* at 2 n.1. The footnote is silent on whether Pryor brought suit in his official capacity representing the State of Alabama. However, it is clear from the

Since I have found that Plaintiffs lack standing to raise claims under the Elections Clause and Tenth Amendment, I do not proceed further. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998) ("For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.").

E. *Conclusion*

In my judgment Title I in its entirety is constitutional. The evidence put forward in the record provides ample justification for Congress enacting the contribution

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entire record in this case that Pryor did not bring this suit in his official capacity. *See* McConnell Second Am. Compl. ¶ 18. At oral argument, Judge Henderson raised the question with Defendant-Intervenors' counsel whether Attorney General Pryor brought suit in his official capacity on behalf of Alabama. The colloquy was:

> JUDGE HENDERSON: Isn't the Alabama Attorney General, Bill Pryor, a plaintiff in the McConnell?
>
> COUNSEL: Yes, he is.
>
> JUDGE HENDERSON: Why isn't he, to the extent that that standing is needed, why doesn't he fill that?
>
> COUNSEL: Because I don't believe he's bringing the action in his capacity as a representative of the state.
>
> JUDGE HENDERSON: All right. I don't remember in the complaint.
>
> COUNSEL: I don't think the State of Alabama is a party in this case.
>
> JUDGE HENDERSON: Well, the state isn't, but he's not representing the State of Alabama.
>
> COUNSEL: I don't believe so, no.
>
> JUDGE HENDERSON: All right.

Tr. at 124-25. Plaintiffs registered no objection to this discussion and, therefore, the only conclusion to be drawn is that Mr. Pryor is not bringing suit in his official capacity on behalf of the State of Alabama.

restrictions at issue in the case. The record demonstrates that FECA's entire contribution structure has been completely gutted by political actors willing to test the limits of the law in a manner that has returned the campaign finance system to a regime equaling the troubling aspects of the 1972 regime. In response, Plaintiffs argue that "BCRA simply goes too far." CDP/CRP Br. at 46. However, reading Plaintiffs' briefing in this case, I am not sure if Plaintiffs would accept any restrictions whatsoever on nonfederal funds. Indeed, Plaintiffs' view of corruption is so incompatible with the *Buckley* Court's understanding of the term, that under Plaintiffs' governing rationale, FECA's contribution limitations upheld in *Buckley* would be struck down.

The Supreme Court has long recognized Congress' broad authority to enact measures to protect the integrity of federal elections. Title I accomplishes its purpose without unduly transgressing the rights of individuals to engage in the political process. While there may be future challenges which test some of the regulations at issue in this case, at this facial challenge stage, Title I survives constitutional attack.

III. Title III: MISCELLANEOUS

Sections 304, 305, 307, 316, and 319

I concur with Judge Henderson's with regard to: BCRA Section 305, the condition on the lowest broadcast unit charged; BCRA Section 307, regarding increased contribution limitations; and BCRA Sections 304, 316 and 319, special provisions dealing with financing campaigns against wealthy opponents (also known as the "Millionaire Provisions").

Section 318: Prohibition of Contributions by Minors

Section 318 adds Section 324 to FECA, providing that:

> An individual who is 17 years old or younger shall not make a contribution to a candidate or a contribution or donation to a committee of a political party.

BCRA § 318; FECA § 324; 2 U.S.C. § 441k. Section 318 is challenged by the McConnell Plaintiffs.

The Government maintains that this provision is subject to *Buckley*'s "closely drawn" scrutiny standard. Gov't Br. at 199. According to the Government, Section 318 serves the important governmental interest of preventing circumvention of contribution limits and is closely drawn to avoid unnecessary infringement of constitutional rights. *Id.* at 200-08. Plaintiffs disagree, arguing that since the provision works as a complete ban on contributions by minors to candidates and political party committees, it is subject to strict scrutiny. McConnell Pls.' Br. at 92. Plaintiffs maintain that even if exacting scrutiny is the appropriate standard, preventing circumvention is not a cognizable government interest in the campaign finance context, and that even if it were, Defendants have failed to show that Section 318 is tailored to serve that interest. *Id.* at 93.

Given the evidence presented in this case, I need not decide the appropriate standard of review, for even if exacting scrutiny were applied to the present situation, Defendants have failed to present sufficient evidence to establish that parents' use of minors to circumvent campaign finance laws serves an important governmental interest.[188] Although it is clear that the FEC and Congress have been concerned for many years with the potential for campaign finance abuses

[188] This reason necessarily precludes discussion of whether the provision is narrowly tailored to meet an important governmental interest.

through the use of minors' contributions,[189] Findings ¶¶ 3.1, 3.2, the evidence presented is insufficient to support government action that abridges constitutional freedoms.

Campaign finance laws prohibit anyone from making "a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution," or "knowingly accept[ing] a contribution made by one person in the name of another person." 2 U.S.C. 441f. Donations made by minor children are specifically addressed in FEC regulations. *See* 11 C.F.R. 110.1(i)(2) (2002 revised ed.).[190] However, enforcing these provisions with respect to contributions by minors has been difficult due to the fact that FECA does not require reporting of a donor's age. *Id.* ¶ 3.9. The evidence also shows that when the FEC has discovered donations given by young children which raised suspicions, their investigations were stymied by the refusal of parents to allow interviews, constitutional privacy concerns, and parental and legal counsel influence. *Id.* ¶ 3.10.

[189] The record also demonstrates that not all contributions to political campaigns made by minors are done by their parents in circumvention of campaign finance laws. *See, e.g.*, Findings ¶ 3.7.

[190] The regulations provide that contributions by minors that do not violate FECA's other provisions are permitted so long as

> (i)The decision to contribute is made knowingly and voluntarily by the minor child;
>
> (ii) The funds, goods, or services contributed are owned or controlled exclusively by the minor child, such as in-come earned by the child, the proceeds of a trust for which the child is the beneficiary, or a savings account opened and maintained exclusively in the child's name; and
>
> (iii) The contribution is not made from the proceeds of a gift, the purpose of which was to provide funds to be contributed, or is not in any other way controlled by another individual.

11 C.F.R. 110.1(i)(2) (2002 revised ed.).

Perhaps due to these difficulties, the Government was able to provide the Court with only four instances where the FEC found contributions were made by parents in the name of their minor children in violation of existing campaign finance laws. *Id.* ¶ 3.8-3.8.4. Some of these investigations have been prompted by newspaper articles discussing contributions made by parents in their young children's names. *Id.* ¶ 3.5, 3.6. Therefore, although the record shows that the threat of circumvention in this manner exists, including statements from lawmakers that fundraising appeals include appeals for contributions from family members, *id.* ¶¶ 3.3, 3.4, the minimal evidence presented does not establish that circumvention of campaign finance laws by parents of minors supports the required governmental interest. If the Government had proffered a more robust record establishing that such corruption exists it likely would have succeeded in establishing this element of the analysis, given that all members of the Supreme Court agree "that circumvention is a valid theory of corruption." *Colorado II*, 533 U.S. at 456. The Government's failure to do so, however, dooms their arguments and Section 318 of BCRA.

IV. Title V: ADDITIONAL DISCLOSURE PROVISIONS

Section 504

For the reasons stated in Judge Leon's opinion, I concur that Section 504 is unconstitutional.

IV. CONCLUSION

For the reasons set forth in this Memorandum Opinion, I find Title I in its entirety consistent with the Constitution. Moreover, I conclude that BCRA's restrictions on electioneering communication as set out in Sections 201, 203, and 204 are constitutional. I also find Section 301 of BCRA constitutional. I further determine that Sections 213, 318, and 504 are unconstitutional. I concur with Judge Henderson's

discussion of Plaintiffs' standing with regard to BCRA's condition on the lowest broadcast unit charged, BCRA's increased contribution limitations, and BCRA's "Millionaire's Provisions."

For anyone who has great faith in the purity of this country's democracy, the factual record amassed in this case is bound to depress. The pre-BCRA campaign finance regime saw wealthy individuals, corporations, and labor unions routinely providing donations, far surpassing legal limitations, to the national party committees to influence federal elections. In some instances, this system compelled corporate entities to give massive amounts of nonfederal funds to the national party committees merely to stay on par with their competitors. Of greater concern, corporations and labor unions poured massive amounts of general treasury funds into electioneering communications designed to influence federal elections, despite longstanding federal policy against corporate and labor union general treasury funds being used for these purposes.

Judge Henderson criticizes my reasoning and conclusions as "treat[ing] a First Amendment with which [she is] not familiar." Henderson Op. at 5. My response is that my approach to adjudicating these cases and the constitutional challenges presented therein has been grounded in a textual analysis of *Buckley* and its progeny. My view of the First Amendment emanates from *Buckley*'s teachings and in resolving these cases I have continually returned to *Buckley* for insight and guidance.

Having spent much time reviewing the record submitted in this case, one thing is very clear: evidence of the wholesale evasion of FECA is not "anecdotal" or "beside the point." Rather, it is evidence of a regulatory regime in disarray. Without BCRA, the major provisions of the Federal Election Campaign Act designed to reduce the corrupting influence of large sums of money channeled into the political process are

decimated. The clock will be turned back to close to 100 years of incremental and balanced campaign finance regulation.

Congress, which has concentrated on enacting a law that is true to *Buckley* to address these abuses, should not be left impotent to correct these glaring problems. In reading much of the legislative debate surrounding BCRA's passage, I am struck by the concern of Congress to abide by *Buckley*'s teachings. In my judgment, the fact that Congress was so cognizant of *Buckley* should give this three-judge panel great pause before reaching out to strike down wholesale provisions of BCRA. In declaring much of BCRA's core tenets facially unconstitutional, it is my belief that this panel's approach has strayed from the conservative, measured, and customary approach to adjudicating facial challenges that is demanded by the dictates of our constitutional tradition. Simply put, on the basis of the record assembled, the Constitution does not act as an impermissible barrier to the changes sought by our coordinate branches to improve the democratic process.

With the record firmly before it, the Supreme Court will review this three- judge panel's legal conclusions *de novo*. *Cf. Colorado II*, 533 U.S. at 458 n.21. The constitutional rights of those who participate in the election of federal officeholders are unquestionably of the highest order, but so too is the sanctity of the process that produces those public officials who participate in the governance of our democratic society.

APPENDIX

I. EXPERT REPORTS ON BCRA'S EFFECT ON POLITICAL ADVERTISEMENTS

Defendants have provided a number of expert reports to address the issue of whether BCRA is overbroad in terms of the types of advertisements it affects. *See, e.g.*, Jonathan S. Krasno & Daniel E. Seltz, Buying Time: Television Advertising in the 1998 Congressional Elections (2000) ("*BT 1998*") [DEV 47]; Craig B. Holman & Luke P. McLoughlin, Buying Time 2000: Television Advertising in the 2000 Federal Elections (2001) ("*BT 2000*") [DEV 46]; Goldstein Amended Expert Report (Oct. 2, 2002) ("Goldstein Expert Report") [DEV 3-Tab 7]; Jonathan S. Krasno & Frank J. Sorauf, Evaluating the Bipartisan Campaign Reform Act (BCRA) [DEV 1-Tab 2] ("Krasno & Sorauf Expert Report"). These studies have been subject to various criticisms, which have been responded to, and I set forth these arguments below.

A. *The CMAG Data Set*

1. All of these studies relied on data from the Campaign Media Analysis Group ("CMAG"), and for that reason, the Court considers it useful to discuss their underlying data source which becomes a point of criticism for Plaintiffs' expert, Dr. James L. Gibson, before discussing the studies' themselves. Dr. Gibson, Plaintiffs' expert witness, produced "An Analysis of the 1998 and 2000 Buying Time Reports," criticizing both Buying Time studies. James L. Gibson, Expert Report, An Analysis of the 1998 and 2000 Buying Time Reports (Sept. 30, 2002) ("Gibson Expert Report") [1 PCS].

2. CMAG tracks political television advertising in the top 75 media markets, containing more than 80 percent of U.S. residents. *BT 1998* at 6-7 [DEV 47]; *BT 2000* [DEV 46] at

18; Gibson Expert Report at 7 [1 PCS]; *see also* Goldstein Dep. (Vol. 1) at 47-49 [JDT Vol. 8] (describing how CMAG compiles its data). These 75 markets are geographically dispersed. Goldstein Rebuttal Report at 23 [DEV 5-Tab 4]; *see also* Goldstein Expert Report App. G at 1-2 [DEV 3-Tab 7] (listing the 75 markets monitored by CMAG). In 1998-1999 New York was the largest media market with 6,812,540 television households representing 6.854 percent of all television households. *See* Dr. James L. Gibson's Rebuttal to the Expert Reports of Kenneth M. Goldstein and Jonathan S. Krasno and Frank J. Sorauf (Oct. 7, 2002) ("Gibson Rebuttal Report") Ex. 2 at 1 [2 PCS] (listing 1998-1999 Nielson estimates of media markets in order of size). Shreveport was the seventy-fifth largest media market, with 370,990 television households, or 0.373 percent of all television households. *Id.* at 2. For each market, CMAG monitors the four major broadcast networks (ABC, CBS, NBC, and Fox), as well as 42 national cable networks. Goldstein Expert Report App. G at 2-3 [DEV 3-Tab 7]. The CMAG data sets include two types of data. First, for every political advertisement aired, CMAG provides a transcript of the audio portion of the advertisement and a storyboard consisting of a still capture of every fourth second of the video portion of the advertisement. Goldstein Expert Report at 6 [DEV 3-Tab 7]. Second, CMAG provides data on each airing of an advertisement, including time, length, station, show and estimated cost. *Id.*

3. The CMAG data set has some "gaps." Goldstein Dep. (Vol. 1) at 52 & Ex. 9 at 16. The CMAG does not monitor local cable advertising in the 75 markets it covers. Gibson Expert Report at 8 [1 PCS]; Gibson Rebuttal Report at 24 [2 PCS]. The 1998 and 2000 CMAG data sets did not cover advertisements broadcast in the nation's 140 smallest media markets, which are more rural than the 75 captured by CMAG. Goldstein Dep. (Vol. 2) at 9-10 & Ex. 9 at 16 [JDT Vol. 8]. For those markets covered, the evidence shows not

all advertisements are captured by CMAG. Dr. Goldstein participated in a validity study of the CMAG data by comparing the CMAG data with a sampling of invoices from eight television stations. *Id.* Ex. 9 at 16. The results show that for seven of the stations, 97 percent or more of the advertisements listed on their invoices correlated with the CMAG data. *Id.* at 16-17 and 28 (Tbl. 2). For one station, however, 20 percent of the advertisements accounted for in the station's invoices could not be found in the CMAG data. *Id.* Dr. Goldstein surmises that this could be the result of inadequate record keeping by the station as well as CMAG omissions. *Id.* at 17 n.3. Dr. Gibson, for the first time in his rebuttal report, finds this to be a major shortcoming of the CMAG data. Gibson Rebuttal Report at 5-6 [2 PCS]. He deduces from these missed advertisements that CMAG "likely missed 1,764 ads," or 5.04 percent of these eight stations' airings, and using these figures estimates "that 48,864 airings that in fact were broadcast [nationwide] . . . were not captured by the CMAG methodology." *Id.* (applying the 5.04 percent figure to the total number of advertisements captured by CMAG). Dr. Gibson assumes, without any factual support, that CMAG has missed the same percentage of advertisements in all the covered media markets. Moreover, although Dr. Gibson acknowledges that "we do not know any of the characteristics of these . . . missing airings," he nonetheless hypothesizes, without any factual research or support, that the advertisements missed are most likely those that "did not have a clear 'political purpose' that could be discerned by the CMAG analysts." *Id.* at 6; *but see* Goldstein Dep. (Vol. 2) at 12 [JDT Vol. 8] (stating that commercials provided to CMAG by Competitive Media Reporting ("CMR")[191] is "overly inclusive," including "ads

[191] CMAG gets [its] data from Competitive Media Reporting, a company that tracked advertising in the top 75 markets in 1998 and 2000, but now tracks advertising in the top 100 markets. Goldstein Dep. (Vol.1) at 47

for the Red Cross, [and] ads for electric companies"). Another shortcoming of the CMAG data is that although it provides 100 percent of the advertisements' audio, it only provides snapshots at four second intervals of the advertisements' video. As such, twenty-five percent of the advertisement storyboards for the 1998 data set do not display the name of the group sponsoring the advertisement. Goldstein Dep. (Vol. 2) at 21 [JDT Vol. 8]; Gibson Expert Report at 8 [1 PCS]. Another perceived shortcoming of CMAG is that it tracks markets not electoral districts, and is unable to distinguish between different versions of advertisements that are identical with the exception of the candidate or officeholder's name (also known as "cookie cutter" advertisements). Gibson Expert Report at 7 [1 PCS]; Gibson Rebuttal Report at 7 [2 PCS]; Goldstein Dep. (Vol. 2) at 113 [JDT Vol. 8].

4. In terms of CMAG's underinclusiveness, Plaintiffs' expert, Dr. Gibson, "presents no evidence or reason to believe that ... including advertisements from the markets not covered would change [the] results [of studies based on the data]." Rebuttal Report of Dr. Arthur Lupia (Oct. 14, 2002) ("Lupia Expert Report") at 28 [DEV 5-Tab 5]; *see also* Goldstein Rebuttal Report at 24 [DEV 5- Tab 4] ("Moreover, Professor Gibson does not offer any reason to believe that the ads run on local cable advertising are significantly different than the broadcast ads captured by CMAG."). Dr. Gibson did not suggest that "CMAG's inability to capture local cable spots introduced any systematic bias into the data." Goldstein Rebuttal Report at 24 [DEV 5-Tab 4]. Most importantly, there is no evidence that Dr. Goldstein's efforts to identify the appropriate electoral district for advertisements in general or for "cookie cutter" advertisements in particular were flawed or failed to correct these CMAG deficiencies. Goldstein Rebuttal Report at 25-27 [DEV 5-Tab 4]; *see also* Goldstein Expert Report App. E at 3 [DEV 3-Tab 7] (detailing the process of pairing "cookie cutter" advertisements with the

appropriate electoral district); Seltz Dep. at 80-84 [JDT Vol. 28] (detailing how the *Buying Time 1998* authors dealt with the "cookie cutter" issue, including consulting political contacts, experts, newspaper articles, and geographic airing of the advertisements). One of Defendants' experts characterized the filling in of this missing data as "a straightforward- though admittedly tedious-exercise to systematically compare the added data in the *Buying Time*/Goldstein database- against available records." Lupia Expert Report at 30 [DEV 5-Tab 5]. According to Dr. Goldstein, the "snapshot" style of the CMAG storyboards does not compromise the "ability to accurately analyze the content of ads, especially because CMAG provides a complete transcription of the audio portion of the ad along with the video captures." Goldstein Rebuttal Report at 24-25 [DEV 5-Tab 4]. Furthermore, Dr. Goldstein states, "there is no reason to believe that there in [sic] any systematic bias associated with the CMAG terminology capturing only one video frame every four seconds." *Id.* at 25. As for the 25 percent of 1998 storyboards which did not indicate the advertisement's sponsor, the *Buying Time 1998* authors were able to remedy this problem by referring to the "CMAG's original coding (which accurately provides the sponsor of the ad in well over 95 percent of cases), examining the content of the ad, and, in a few cases, by phoning television stations." *BT 1998* [DEV 47] at 8.

5. Defendants' expert Goldstein explains that CMAG data is relied on by "[c] andidates and political parties interested in monitoring elections across the nation (including both the Democratic and Republican Executive Committees, not to mention several of the plaintiffs in this litigation)." Goldstein Rebuttal Report at 23-24 [DEV 5-Tab 4]. Dr. Goldstein states that CMAG data has served as the basis for a number of his articles, "which have been published in the top-rank of peer-reviewed political science journals." *Id.* at 39. Dr. Goldstein also states that "[d]uring the peer-review process for these

articles, none of the academic reviewers shared Professor Gibson's concerns about the validity or reliability of the CMAG databases," which include reviews conducted by two of "the three most prestigious journals in [the political science] discipline." *Id.* at 39 & n.21 (quoting Gibson Expert Report at 2 [1 PCS]). Furthermore, Dr. Goldstein notes that during the 2000 and 2002 election cycles, the Wisconsin Advertising Project, which he heads, has provided CMAG data to journalists covering political advertising in real time. *Id.* Although "[m]uch of the data we report can cast the election strategies of particular candidates, parties or interest groups in an unfavorable light .... at no time have we been challenged on the accuracy of the factual data we have reported on the content and targeting of political advertising." *Id.* at 39-40. Dr. Gibson does not contest these statements in his rebuttal report, and does not suggest a better source of data for this type of study. *See* Gibson Expert Report at 6-9 [1 PCS]; Gibson Rebuttal Report at 3-7 [2 PCS].

B. *The Annenberg Public Policy Center Reports*

1. The Annenberg Public Policy Center ("Annenberg Center") "was established by publisher and philanthropist Walter Annenberg in 1994 to create a community of scholars within the University of Pennsylvania that would address public policy issues." Annenberg Report 1997 at 2 [DEV 38-Tab 21].

2. "For much of the last decade the Annenberg Center has been tracking the growth of broadcast issue advocacy advertising." Annenberg Report 2001 at 1 [DEV 38 Tab-22]. The Annenberg Center notes that to "the naked eye, these issue advocacy ads are often indistinguishable from ads run by candidates. But in a number of key respects, they *are* different. Unlike candidates, issue advocacy groups face no contribution limits or disclosure requirements. Nor can they be held accountable by the voters on election day." Annenberg Report 1997 at 3 [DEV 38 Tab-21].

3. The Annenberg Report 1997 reported that more than two-dozen organizations, including "political parties, labor unions, trade associations and business, ideological and single-issue groups" spent an estimated $135 million to $150 million worth of issue advertisements during the 1995-1996 campaign, compared to the $400 million spent on advertising by the federal candidates running for office. Annenberg Report 1997 at 3 [DEV 38 Tab-21]. Almost 86.9 percent of these advertisements mentioned a candidate for office or public official by name. *Id.* at 8. "Most" of the groups running these advertisements "declined to make known the identities of their donors." *Id.* at 4.

4. The Annenberg Center's 1998 report estimates that at least 77 groups ran issue advertisements during the 1997-1998 election cycle costing between $275 and $340 million." Annenberg Report 1998 at 1 [DEV 66-Tab 6]. Overall, 53.4 percent of these advertisements mentioned candidates by name, although 80.1 percent of those advertisements run in the final two months of the campaign mentioned candidates. *Id.*

5. As also discussed *supra*, the Annenberg Report 2001 finds that during the 1999-2000 election cycle 130 groups aired 1,100 distinct advertisements, at an estimated cost of over $500 million. Annenberg Report 2001 at 1 [DEV 38-Tab 22]. The report found that 60 percent of distinct radio and television issue advertisements (689 out of 1,139) aired from January 1, 1999 to November 7, 2000, were broadcast for the first time during the final two months of the election cycle. *Id.* at 12. In addition, 73 percent of all the distinct advertisements mentioned a candidate. *Id.* at 14. In terms of television advertisements, the closer the advertisement was aired to election day, the more likely it contained a candidate mention. *Id.* at 15. Between March 8 and August 31, 2000, candidates were mentioned in 72 percent of the television issue advertisements aired. *Id.* After August, 95 percent of the

television commercials broadcast mentioned a candidate. *Id.* The report found that during the 2000 election cycle, 89 percent of unique advertisements were "candidate- centered," meaning they made "a case for or against a candidate" without using express advocacy. *Id.* at 13, 14.

6. The Annenberg Center reports were relied on by Members of Congress, cited to during the Senate debate, and are relied on by Plaintiffs in this litigation. *See, e.g.*, 147 Cong. Rec. S2456 (daily ed. March 19, 2001) (statement of Sen. Snowe) (citing Annenberg Report 2001); Findings ¶ 2.2.1 (Lupia)

C. *The Goldstein Expert Report*

Dr. Goldstein, who was involved in assembling the data sets used in both *Buying Time* studies, produced his own expert report for the purpose of this litigation. *See generally* Goldstein Expert Report. Since Dr. Goldstein did not participate in the writing of either *Buying Time* studies or play a role in "selecting the conclusions that the authors of these reports chose to draw from the database," Goldstein Rebuttal Report at 3-4 [DEV 5-Tab 4], his report constitutes a separate assessment of the data collected. Furthermore, the database he works from differs from that provided to the *Buying Time 2000* authors, as it has corrected omissions and errors discovered after *Buying Time 2000* was completed. *Id.* at 4-5. Dr. Goldstein's study produces nine principal conclusions. Other than his problems with the CMAG database which underlies the study, *see supra* App. ¶ I.A, Dr. Gibson leaves most, but not all, of the conclusions in Dr. Goldstein's Expert Report unchallenged. *See* Gibson Rebuttal Report [2 PCS]. Dr. Goldstein's conclusions and Dr. Gibson's criticisms are discussed *infra*.

1. *Scope of Political Advertising*. The following conclusions are notrebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. In the 2000 election

cycle (from January 1, 2000 through election day), interest groups accounted for 16 percent of all political television advertisements at an estimated cost of $93 million.[192] Goldstein Expert Report at 8. Political parties accounted for 27 percent of the political commercials at an estimated cost of $162 million, while candidates accounted for the remaining 52 percent of advertisements at an estimated cost of $338 million. *Id.* Compared to the 1998 campaign, the increase in interest group spending was the most dramatic, "rising from approximately $11 million in 1998 to an estimated $93 million in 2000." *Id.* at 9; *see also id.* at 10 (Tbls. 1A-B) (showing the increase in candidate spending (from approximately $136.6 million to approximately $338.4 million) and in political party spending (from approximately $25.6 million to $162.3 million)). The majority of interest group advertising in 2000 was "not sponsored by PACs, and fell outside FECA regulation." *Id.* at 8. According to Dr. Goldstein's figures, interest group PACs spent roughly $2 million on 3,688 political advertisements in federal races in 2000, while interest group non-PAC expenditures constituted $90 million spent on 129,647 commercials. *Id.* at 10 (Tbl. 1B).

2. *The Role of Interest Groups and Political Parties in Political Television Advertising for the 2000 Presidential Campaign:* The following conclusions are not rebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. In terms of the presidential campaign, political parties purchased 41 percent of television advertisements aimed at the 2000 presidential race, while candidates

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[192] Dr. Goldstein notes "[t]hese figures ... underestimate television expenditures because CMAG estimates only cover markets serving 80 percent of the nation's population and make no attempt to measure the increased cost of advertising during the peak seasons of political campaigns when the demand for television advertising time pushes up spot prices." Goldstein Expert Report at 8 [DEV 3-Tab 7].

accounted for 38 percent of the commercials, and interest groups eight percent. Goldstein Expert Report at 11 & n.11 [DEV 3-Tab 7] (the remaining advertisements were coordinated expenditures). Interest group advertising in certain "battleground" states,[193] however, "rivaled that of the candidates or parties." *Id.; see also id.* at 12 (Tbl. 2). For example, in Missouri, during the last 60 days of the election, "interest groups ran almost three-quarters as many ads" identifying a candidate as did the actual candidates. *Id.* at 11. In House elections, interest group advertisements identifying a candidate and running in the last 60 days of the campaign accounted "for 17 percent of total House ad broadcasts during the 2000 election cycle," while political parties provided 22 percent of advertisements in these races, and candidates 60.6 percent. *Id.* at 13. Dr. Goldstein finds that 99.8 percent of political party-financed television advertising mentioned or depicted a candidate, while only 1.8 percent of the ads "even mentioned the name of the party and many fewer promoted the candidate by virtue of his or her party affiliation." *Id.*[194]

3. *The BCRA Universe of Interest Group Electioneering:* The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. Dr. Goldstein finds that 35 interest groups broadcast commercials on television during the last 60 days of the 2000 election that mentioned a candidate. Goldstein Expert Report at 13 [DEV 3-Tab 7]. These electioneering advertisements were aired 59,632 times at an estimated cost of approximately

[193] Dr. Goldstein determined what states constituted "battleground states" "based on a professional review of various media sources," such as CNN.com. Goldstein Expert Report at 12 n.12 [DEV 3-Tab 7].

[194] This assessment does not include the "tag lines" included in most advertisements identifying the commercial's sponsor that can include the political party's name. Goldstein Expert Report at 13 n.14 [DEV 3-Tab 7].

$40.5 million. *Id.* at 14; *see also id.* at 14-15 (Tbl. 3).[195] The top ten of these groups accounted for 87 percent of these expenditures. *Id.* at 13.

4. *The "Magic Words" Test:* The following findings are not rebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. The so-called "magic words" test derives from *Buckley*'s legal standard for determining whether an advertisement is designed to persuade citizens to vote for or against a particular candidate. Such advertisements were termed "express advocacy" by the Supreme Court, and defined as containing words such as "elect," "defeat" or "support." *See supra* at 211. Dr. Goldstein notes that all candidate-sponsored advertisements must be paid for with federal funds and are considered to be electioneering, regardless of whether they meet the express advocacy test. Therefore, if the use of express advocacy terminology is "an accurate way to classify an ad, then advertisements clearly and obviously created and aired to influence elections would be expected to employ such magic words." Goldstein Expert Report at 16 [DEV 3-Tab 7]. Dr. Goldstein finds, however, that 11.4 percent of the 433,811 advertisements aired by candidates met the express advocacy test. *Id.* Conversely, 88.6 percent of candidate advertisements in 2000 "were technically undetected by the *Buckley* magic words test." *Id.* This result demonstrates to Dr. Goldstein "that magic words are not an effective way of distinguishing between political ads that have the main purpose of persuading citizens to vote for or against a particular candidate and ads that have the purpose of seeking support for or urging some action on a particular policy or legislative issue." *Id.*

[195] This result only reflects the 80 percent of households covered by CMAG, and according to Dr. Goldstein "[n]o comprehensive information is available for the balance of the markets or for ads airing on local cable stations." Goldstein Expert Report at 14 n.15 [DEV 3-Tab 7].

5. *Temporal Distribution of Interest Group-Financed Television Advertisements Which Mention a Candidate:* The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. Dr. Goldstein determines that the "CMAG database provides empirical evidence of a strong positive correlation between [advertisements' reference to a candidate and the proximity in time of their broadcast to the election] and consequently of their validity as a test for identifying political television advertisements with the purpose or effect of supporting or opposing a candidate for public office." Goldstein Expert Report at 17 [DEV 3-Tab 7]. He finds that interest group advertisements that "mention or depict a candidate tend to be broadcast within 60 days of the election," while those which do not "tend to be spread more evenly over the year." *Id.* Specifically, his calculations show 78 percent of interest group advertisements mentioning a candidate for federal office aired within 60 days of the election, while 18 percent of those that did not mention a candidate were aired during that time. *Id.* (also finding 85 percent of advertisements mentioning a presidential candidate and 76 percent of commercials mentioning a House candidate aired within 60 days of the election). In addition, Dr. Goldstein finds the distribution of those advertisements mentioning candidates for federal office to be "closely correlated to the distribution of electioneering communications broadcast by candidates and political parties." *Id.* For example, 76 percent of interest group advertisements mentioning a House candidate were broadcast within 60 days of the election, as compared to 79 percent of such advertisements run by candidates, and 94 percent of those purchased by political parties. *Id.* For Senate elections, 74 percent of interest group advertisements that mentioned a candidate were run within 60 days of the election, as were 67 percent of candidate and 81 percent of political party-sponsored commercials. *Id.* at 17-18; *see also id.* at 19 (Tbl 4).

6. *Geographic Distribution of Interest Group-Sponsored Advertisements Which Mention a Candidate and are Aired within 60 Days of an Election:* The following conclusions are unrebutted, except to the extent that they rely on CMAG data. *See supra,* App. ¶ I.A. Dr. Goldstein finds that interest group advertisements that mentioned a candidate and were broadcast within 60 days of the 2000 election "were highly concentrated in states and congressional districts with competitive races." Goldstein Expert Report at 20 [DEV 3-Tab 7]. For Senate races, 89.2 percent of these commercials ran in competitive races, including Michigan where interest groups accounted for "22 percent of the total ads broadcast in the race." *Id.* Political parties were similarly focused, running 90.6 percent of their ads in the competitive states. *Id.* at 21. Four states (Michigan, Virginia, Washington, and Florida) attracted "77 percent of the ads broadcast by interest groups [aimed at Senate races]; political parties broadcast 65 percent of their ads in these four states." *Id.* at 20; *see also id.* at 21 (Table 5). House races demonstrated the same pattern, with 85.3 percent of interest group "electioneering" advertisements, and 98.2 percent of political party "electioneering" advertisements broadcast in competitive districts. *Id.* at 21; *see also id.* at 22-23 (Table 6). In some competitive congressional districts, interest groups ran more advertisements than the candidates or their parties. *Id.* at 22. Therefore, concludes Dr. Goldstein, the "CMAG database provides strong evidence that the interest group ads covered by BCRA are targeted at competitive electoral contests and closely parallel political party ads in their geographic distribution." *Id.* at 24.

7. *Coders' Perceptions of Interest Group Television Advertisements:* Dr. Goldstein had students code each interest group political television advertisement aired in the 2000 campaign. They could code the commercials' purpose as either to "'generate support or opposition for candidate,' or to 'provide information or urge action,'" and "were also given

the option of 'unsure/unclear.'" Goldstein Expert Report at 24 & n.20 [DEV 3-Tab 7]. Dr. Goldstein finds that "[t]he coders' perceptions provide evidence that BCRA's definition of Electioneering Communication accurately captures those ads that have the purpose or effect of supporting candidates for election to public office." *Id.* at 26. The coders found 97.7 percent of the 60,623 interest group sponsored television advertisements that mentioned a candidate and were broadcast within 60 days of an election as "electioneering," or supporting or opposing a candidate. *Id; see also id.* at 25 (Tbl. 7). Dr. Goldstein finds this result particularly persuasive given the fact that the students coded one-third of all interest group television advertisements run over the course of the 2000 campaign to be genuine issue advertisements. *Id.* at 26. Of the 45,001 advertisements deemed to be "genuine issue advertisements" by the coders, 3.1 percent would have been covered by BCRA in that they were run within 60 days of the election and identified a candidate. *Id.* at 27.[196] Dr. Goldstein acknowledges that in *Buying Time 2000*, and an article he co-authored with Dr. Jonathan Krasno, fewer than six advertisements were said to be unfairly captured by BCRA. *Id.* at 26 n.21. In those other publications, "certain of these six ads-particularly those as to which there was disagreement among the student coders-were ultimately treated as electioneering. In fact, [Dr. Goldstein's] own judgment is that five of these six ads were clearly intended to support or oppose the election of a candidate .... However, in this report, [Dr. Goldstein] chose[]to take the most conservative approach and count all six as Genuine Issue Ads." *Id.* However, Dr. Goldstein now acknowledges that a "most

[196] Dr. Goldstein contends that this "percentage overstates the proportion of all Genuine Issue Ads covered by BCRA, because it does not take into account the unregulated ads run in non-election years during a single Congressional Term, such as 1999." Goldstein Expert Report at 27 n.22 [DEV 3-Tab 7].

conservative" estimate would include 6 more advertisements listed in footnote 8 of his Rebuttal Report. Goldstein Dep. (Vol. 2) at 160 [JDT Vol. 8]. Adding these six advertisements results in the finding that 17 percent of the advertisements run during the last 60 days of the 2000 campaign identifying candidates were genuine issue advertisements. *Id.* at 169; *see also infra* App. ¶ I.D.8.c (discussing these advertisements in more detail).[197] Dr. Gibson finds fault with the fact that this conclusion relies on a methodology he finds problematic. He insists the conclusion is flawed by focusing "on the highly subjective coding" of the student coders to determine the purpose of the issue advertisements (*i.e.* to promote a candidate or to urge action on an issue). Gibson Rebuttal Report at 20 [2 PCS]; *see also* Holman Dep. at 73 [JDT Vol. 10] (noting that the question asks for a subjective assessment). As discussed *infra* in connection with the *Buying Time* studies, Dr. Gibson also believes that the data shows that a large majority of the advertisements barred by BCRA "have policy matters as their primary focus," thereby destroying the distinction he draws between electioneering and genuine issue advocacy. Gibson Rebuttal Report at 20 [2 PCS]; *see also infra* App. ¶ I.D.8.e.

8. *The Effectiveness of Broadcasting Issue Ads Close to an Election:* Dr. Goldstein's final conclusion is that if an interest group is genuinely interested in promoting an issue, the least desirable time to air such an advertisement is in the final 60 days of an electoral campaign. Goldstein Expert Report at 32 [DEV 3-Tab 7]. This finding runs counter to Plaintiffs' argument that BCRA "may harm interest groups by preventing them from advertising on their issues at a time when citizens are supposedly paying the most attention to politics." *Id.* Dr. Goldstein first comments that "while there is evidence that interest in politics and *elections* rises as

[197] This revelation casts doubts on some of Dr. Goldstein's other conclusions which are therefore not recounted here.

Election Day approaches, there is absolutely no evidence to support the position that interest in *public policy* issues rises as well during that time." *Id.* (emphasis in original). Second, he notes that "communication theory has concluded that advertising is likely to be most effective (at informing or persuading) when viewers are exposed to one-sided flows of information in isolation from other advertising." *Id.* (citing William McGuire, The Myth of Massive Media Impact: Savagings and Salvagings, 3 Public Communication and Behavior 173 (1986); John Zaller, The Nature and Origins of Mass Opinion (1992)). Dr. Goldstein notes that since the last two months of an election campaign is when most political advertisements are aired (64.2 percent of all political advertisements run in 2000 were run in the campaign's final 60 days), "an individual interest group's message on a public policy issue is likely to become lost" if aired during that period. *Id.* Dr. Goldstein also posits that "partisan attachments . . . harden during the last two months of a campaign" which makes it "more difficult to persuade otherwise open-minded viewers of the merits of an interest group's policy stance." *Id.* at 32-33 (citing John Zaller, Nature and Origins of Mass Opinion (1992)). Finally, running issue advertisements close to an election, besides being less effective at conveying their messages, is "also less cost-effective, since the price of scarce television and radio air time is higher near an election than during the rest of the year." *Id.* at 33. Dr. Goldstein argues his theory is bolstered by the data from his study. Interest group advertisements not mentioning a candidate are spread over the course of the calendar year and are not concentrated within the last two months of a campaign. In 2000, 17.7 percent of such advertisements were aired in the final 60 days of the election campaign, slightly more than the 16.4 percent "which would have run if the ads had been equally distributed throughout the year." *Id.* at 33; *see also id.* at 31 (Table 9). In contrast, during the months of April through June 2000, 45 percent of

such issue advertisements were aired, "as against an expected 25 percent if the ads were spread evenly throughout the year." *Id.* Dr. Goldstein believes this concentration is "a likely result of groups turning on the heat to pass or defeat bills before Congress adjourned for the summer." *Id.* Therefore, Dr. Goldstein finds that the data confirms his theory that the final two months of an election campaign "is probably the worst time for an interest group to educate the public on its particular issue." *Id.* However, Dr. Gibson is critical of this conclusion. Gibson Rebuttal Report at 26 [2 PCS]. According to Dr. Gibson, political psychologists, like William McGuire (whose work Dr. Goldstein cites), have concluded "that to persuade someone involves two steps. First, one must get the attention of the person one is attempting to persuade. Second, one must overcome the strength of existing attitudes if the attempt at persuasive communication is to result in attitude change." *Id.* Given that "those with strong attitudes tend to pay attention to political communications while those with weak political attitudes tend to ignore them . . . . [t]hose most easily reached are least easily changed; those most easily changed are those most difficult to reach." *Id.* Since those with "weak attitudes" tend to pay attention during "the most extreme circumstances," the period leading up to the election provides the window in which to communication with these difficult to reach, but easily persuaded individuals. *Id.* at 27. Dr. Gibson also rejects the argument that issue advertising close to an election is unproductive because partisan allegiances harden as elections approach. *Id.* He states that this line of reasoning leads to the strange conclusion that "candidates should abandon advertising as the election approaches since these hardened attitudes are difficult to convert." *Id.* Dr. Gibson points out that "that does not happen, since, as the election approaches, candidates try to reach an even greater percentage of marginal voters, who have little interest in politics, and relatively pliable issue views." *Id.*

D. *Buying Time Studies*

1. The Brennan Center for Justice at New York University Law School ("Brennan Center") produced two studies examining television advertising in election campaigns. *See BT 1998* [DEV 47]; *BT 2000* [DEV 46]. The Brennan Center is "primarily a law firm that also does a great deal of research in a variety of social science issues that includes campaign finance along with criminal justice and other electoral issues and poverty issues." Holman Dep. at 10 [JDT Vol. 10]. The Brennan Center was involved in the crafting of BCRA and provided analysis of issues being debated in Congress to legislators, the media and the public. *Id.* at 11. The Center also put together a letter signed by 88 First Amendment scholars, concluding that the McCain-Feingold bill was constitutional. *Id.* at 19 & Ex. 3. Representatives of the Brennan Center testified in favor of the McCain-Feingold bill, *id.* at 22, and during Senate debate on the legislation, Senators cited to *Buying Time* data and Brennan Center analyses. Holman Dep. Ex. 3 at 2 [JDT Vol. 10].

2. The Pew Charitable Trust funded both *Buying Time* studies. *See BT 1998* [DEV 47]; *BT 2000* [DEV 46]. The Brennan Center's funding proposal for *Buying Time 1998* states that the study had an academic purpose, but would also be used "to fuel a continuous and multi-faceted campaign to propel reform forward." Holman Dep. Ex. 4 at 2 [JDT Vol. 10]. The proposal painted the study as part of a strategy to overcome the "obstacles to reform," and noted that the first step in achieving the goal was "to develop a reliable source of information on the nature of the problem." *Id.* at 7. The Brennan Center proposed a two-phased research plan for *Buying Time 1998*. Krasno Dep. Ex. 4 at 1 [JDT Vol. 14]. The first phase, proposed to cost $200,000, entailed acquiring data from CMAG, "adapt[ing] it so that it might be easily used, and us[ing] it to develop a strategy for responding to the threat posed by issue advocacy." *Id.* at 1, 3. The second

phase, estimated to require $800,000 to complete, would "focus on convening a formidable group of scholars and activists to create policy recommendations and reports, as well as . . . publiciz[ing] these activities on Capitol Hill and beyond." *Id.* at 3. Whether or not the study would proceed to the second phase, according to the proposal, would "depend on the judgment of whether the data provide[d] a sufficiently powerful boost to the reform movement." *Id.* at 6. In April or May of 2000, Dr. Kenneth Goldstein of the University of Wisconsin, who had worked on the data set for *Buying Time 1998* petitioned the Pew Center for another grant. Goldstein Dep. (Vol. 1) at 29 [JDT Vol. 8]. His request stated that he was "happy to work with others in the policy community to make sure that our study is designed and executed in ways that help move the reform ball forward." Goldstein Dep. (Vol. 1) at 37 & Ex. 6 at 5 [JDT Vol. 8].

3. Mr. Seltz, co-author of *Buying Time 1998*, states that there were a number of purposes behind the study, but that "the primary purpose was to contribute to the body of knowledge about campaign finance reform and specifically issue advocacy . . . and to fill what we viewed to be an empirical void in the literature about issue advocacy. Seltz Dep. at 22 [JDT Vol. 28]. "An independent but related purpose . . . was indeed to provide information to . . . proponents of campaign finance reform to help them fashion new and better arguments for reform, but arguments that would be based on research that was verifiable, checkable, transparent, reproducible." *Id.* Mr. Holman, a principal co-author of *Buying Time 2000*, did not approach the project with the purpose of producing results that would support campaign reform and had never seen the grant proposal submitted to the Pew Charitable Trust. Holman Dep. at 25-26 [JDT Vol. 10]; *see also id.* at 29-30 ("I was mostly excited about the political science aspect of [the study] . . . . It was not clear at any point and never explained to me exactly what sort of policy direction that would go in.").

4. Dr. Kenneth Goldstein provided assistance in processing and coding data for the *Buying Time* studies. Goldstein Rebuttal Report at 6 [DEV 5-Tab 4]. As part of this effort, he merged CMAG's two data sets to produce "a single, comprehensive data set." *Id.* He also had university students (at the University of Arizona for *Buying Time 1998* and the University of Wisconsin for *Buying Time 2000*) "assess[] . . . the content, tone, issues addressed, whether the ads mentioned a political candidate or provided a toll-free number to call, etc. . . . In addition to collecting certain specific information concerning each storyboard reviewed, the study also asked coders: 'In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?'" Goldstein Expert Report at 7 [DEV 3-Tab 7]. Advertisements that provided information or urged action on a bill or issue were labeled "genuine issue ads" in both studies, whereas those communications that generated support or opposition for a particular candidate were referred to as "sham issue ads" in *Buying Time 1998, see, e.g., BT 1998* [DEV 47] at 87, and "electioneering issue ad" in *Buying Time 2000, see, e.g., BT 2000* [DEV 46] at 30. Each *Buying Time* database consists of 40 million data points. *Id.* at 37.

5. As noted *supra,* App. ¶ I.A, Dr. Gibson criticizes the CMAG data underlying both reports. Dr. Arthur Lupia was asked by the Brennan Center to evaluate Dr. Gibson's Expert Report and provided a report detailing his findings. *See generally* Lupia Expert Report.

6. *Buying Time Findings*

a. *Buying Time 1998* drew a number of conclusions with regard to the nature and effect of political advertising in the United States. The study's main findings include:

• Four percent of candidate advertisements used "express advocacy" terms. *BT 1998* [DEV 47] at 9. • The proportion of issue advertisements mentioning a

candidate rises as the date of the election approaches. In July and August 1998, 61 percent of issue advertisements mentioned a candidate. By September, the percentage reached 82 percent and for the remainder of the campaign remained at 82 percent or higher, reaching a peak of 97 percent in the first half of October. *Id.* at 87, 103 (Figure 4.15).

• Forty-one percent of issue advertisements that provided information or urged action appeared within 60 days of the election, but only two of those advertisements, or seven percent, referred to a candidate. *Id.* at 109.

b. *Buying Time 2000*'s key findings from the 2000 election cycle included:

• Seven percent of all political advertisements contained express advocacy terms. *BT 2000* [DEV 46] at 73. Candidates used express advocacy terminology in 10 percent of their ads, *id.* at 15, 29, while political parties and interest groups used such terms approximately two percent of the time, *id.* at 73.

• "Genuine issue ads" (those urging action on a public policy or legislative bill) were "rather evenly dispersed throughout the year, while group-sponsored electioneering ads [which promote the election or defeat of a federal candidate] make a sudden and overwhelming appearance immediately before elections." *Id.* at 56.

• The study found that if BCRA had applied to the 2000 campaign, three genuine issue ads (which aired 331 times) would have fallen within the Act's definition of "electioneering communication." *Id.* at 73. Put another way, of the advertisements run within 60 days of the 2000 election which also depicted a candidate, 99.4 percent constituted electioneering advertisements, while 0.6 percent were genuine issue advertisements. *Id.* at 72 (Figure 8-2).

7. *Criticism of Buying Time 1998*

a. Plaintiffs' expert, Dr. James L. Gibson, while leveling various criticism at both *Buying Time* studies, does not dispute that express advocacy words "are rarely used in political advertising, or that group sponsored ads that mention candidates tended to be concentrated before an election." Goldstein Expert Report at 38-39 [DEV 3-Tab 7]; *see also* Lupia Expert Report at 9 [DEV 5-Tab 5]; Gibson Expert Report at 11 [1 PCS] ("Entirely objective characteristics of the ads . . . present few threats to reliability."). Neither does he challenge the conclusions that advertisements sponsored by political parties and interest groups comprise a significant and increasing portion of political advertising broadcast in federal races. Lupia Expert Report at 9 [DEV 5-Tab 5].

b. Dr. Gibson states that "*Buying Time 1998* should not be accepted as the product of scientific inquiry, but is instead policy advocacy written by people with a strong ideological commitment to a particular position on campaign finance reform." Gibson Expert Report at 3 & n.3 [1 PCS] (citing the research proposal and co-author Daniel Seltz's deposition testimony); *see also supra* App. ¶ I.D.2. Dr. Gibson suggests that "[t]he strong policy and ideological commitments of the investigators are not compatible with the conventional cannons of scientific objectivity and may have undermined the integrity of the data collection and analysis." Gibson Expert Report. at 3 n.3 [1 PCS]. He applies this criticism to *Buying Time 2000* as well. *Id.* at 45. Dr. Krasno confirms that *Buying Time 1998* is an advocacy document. Krasno Rebuttal Report at 2 [DEV 5-Tab3]. He admits that he believed that groups and political parties were sponsoring "thinly-veiled campaign ads masquerading as issue advocacy." *Id.* However, Dr. Krasno suggests that "[t]he fact that we expected certain results (and those expectations were largely realized) loads the issue emotionally, but misses the point. Scholars rarely embark upon research without some expectations as to its

results. But more than most scholars, we had a compelling reason to insure that our results could withstand allegations of bias." *Id.* Dr. Krasno also notes that Daniel Seltz's responsibilities with regard to *Buying Time 1998* did not include data analysis. *Id.* at 3. Dr. Lupia comments that a "person's political or ideological beliefs need not prevent them from being an effective scientist," and that Dr. Gibson's allegation that "*Buying Time* cannot be the product of scientific inquiry because its authors have an ideological commitment" is erroneous. *Id.* Dr. Lupia also states that he knows of no "conventional canons of scientific objectivity," and that Dr. Gibson fails to produce one. *Id.* Lastly, Dr. Lupia observes that Dr. Gibson's claim that the policy perspective of the *Buying Time 1998* authors "may have undermined the integrity" of the study, "is pure speculation," and Dr. Gibson's report "presents no direct evidence on this point." *Id.* at 11. Dr. Goldstein rejects the charge that he or anyone under his supervision "perverted" the results of the databases, or that his approach to the project was based on anything other than "the spirit of scientific inquiry and objectivity." Goldstein Rebuttal Report at 8 [DEV 5-Tab 4]. He also claims that his "interest in creating a scientifically valid and reliable database was based on more than just abstract notions of professionalism and objectivity, as important as they were. I always intended to use-and, in fact, have used-CMAG databases in a wide variety of other scholarly studies having nothing to do with campaign finance reform." *Id.* at 8-9.

c. Dr. Gibson states that *Buying Time 1998* was not part of a peer-review process prior to its publication, meaning it "was not vetted in any way whatsoever prior to its publication, and consequently the normal process of explication of the project methodology, error correction, and review of substantive conclusions prior to publication did not take place." Gibson Expert Report at 4 [1 PCS]. Dr. Gibson maintains that this "seriously limits the confidence one can place in the Report." *Id.* Dr. Gibson makes the same criticism of *Buying Time*

2000. *Id*. at 45. Dr. Krasno states that this fact was the result of time constraints dictated by the political calendar, the funders of the study, and policymakers, and notes that "subsequent publications by myself and by Professor Goldstein have withstood the peer review process." Jonathan S. Krasno, Rebuttal to Professor James L. Gibson at 3-4 & n.3 (citing to Jonathan Krasno & Kenneth Goldstein, "The Facts About Television Advertising and the McCain-Feingold Bill," 35 Political Science 207 (2002)). Dr. Lupia finds the significance of the lack of peer-review "doubtful . . . at best." Lupia Expert Report at 13 [DEV 5-Tab 5]. He notes that Dr. Gibson "displays no apparent knowledge of whether scholars or experts had opportunities to comment on critical aspects of the *Buying Time* reports." *Id*. at 14.

d. Dr. Gibson maintains that "[n]o data base has been (nor can be, it appears) produced that will generate the specific numbers found in [*Buying Time 1998*] .... In the social sciences, we demand that statistical analysis be replicable .... This report is not replicable, and that undermines tremendously any confidence one should place in the findings produced." Gibson Expert Report at 5 [1 PCS]; *see also id*. at 23-26; Seltz Dep. at 52 [JDT Vol. 28] (stating that the *Buying Time 1998* authors did not "track the evolution of all the changes" or corrections they made to the data set). Dr. Gibson levels the same charges at *Buying Time 2000*. Gibson Expert Report at 47-48 [1 PCS]. Dr. Krasno agrees that "replication is a core precept of science," but states that Dr. Gibson "overstates the case by insisting on 'exact' replication." Krasno Rebuttal Report at 6 [DEV 5-Tab 3]. According to Dr. Krasno, perfect replication "of the results of others, even with their help, is often impossible." *Id*. (quoting Gary King, Replication, Replication, 28 Political Science 444 (1995)). Dr. Gibson was not able to consult with Dr. Krasno in order to discover "the original command files used to produce the numbers in *Buying Time 1998*," which Dr. Krasno maintains replicate the *Buying Time 1998* results. *Id*. at 6-7 & n. 6; *see*

also id. at 8 n.10 ("[I]t appears that Professor Gibson worked with a slightly different version of the data set than that used to create *Buying Time 1998*."); Lupia Expert Report at 18 n.3 [DEV 5- Tab 5]. Despite using the incorrect data set, Dr. Krasno notes that where Dr. Gibson provides examples of the discrepancies between his findings and those of *Buying Time 1998*, the differences are statistically insignificant. *Id*. at 7-8 (referring to Gibson Expert Report at 24 [1 PCS]); *see also* Goldstein Expert Report at 18 n.10 [DEV 3-Tab 7] (stating that the variances in Dr. Gibson's results "are so small as to suggest their own triviality"); Lupia Expert Report at 43 [DEV 5-Tab 5] (stating "the demonstrated discrepancies are small" and the Gibson Expert Report "provides no evidence that such changes affect any of *Buying Time*'s major claims"). Dr. Goldstein contends that the reason Dr. Gibson could not replicate the results of *Buying Time 2000* was because he was using the wrong data set. Goldstein Rebuttal Report at 18, 19-20 [DEV 5-Tab 4].[198] Using the "federal.sav" data set produced by the Brennan Center, Dr. Goldstein was "able to replicate key findings of the *Buying Time* [*2000*] study," and correlate others "within a fraction of a percentage point." *Id*. at 20. Dr. Goldstein comments that Dr. Gibson had all the information to "replicate the *Buying Time* studies in the most direct fashion-that is, by re-coding all (or even a sample) of the captured advertisements and comparing the results of his

[198] The result of this confusion is that instead of the experts arguing from the same data set, each produces conclusions from a different set of numbers. The source of the divergence in data relied upon appears to be the result of the number of data sets provided to the Plaintiffs by Defendants' experts and the late production of additional data sets. *See* Gibson Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") [2 PCS]. Furthermore, since the analysis of the studies occurred in the context of litigation, the two sides' experts could not confer and resolve the resulting confusion regarding the data sets. This fact has made the duel between the parties' experts more confusing, and therefore less helpful to the Court.

coding exercise with the results of mine. Because Dr. Gibson never attempted to test the conclusions implicit in the database by replicating the coding exercise, most of his assertions about the reliability and validity of the conclusions drawn from the databases are necessarily speculative." *Id.* at 19; *see also* Lupia Expert Report at 17 [DEV 5-Tab 5] ("It is also worth noting that the Plaintiffs and their experts passed up the opportunity to resolve their concerns by replicating the data collection procedure itself."). Dr. Lupia comments that just because "a particular scientist fails in her attempt to *replicate* a study does not show that the study is not *replicable* . . . . The claim that 'the report is not replicable' is not proved in the [Gibson] report." Lupia Expert Report at 17 [DEV 5-Tab 5] (emphasis in original); *see also id.* at 44.

e. Dr. Gibson charges that the *Buying Time 1998* report "is filled with questionable statistical techniques and applications." Gibson Expert Report at 5 [1 PCS]. Dr. Lupia observes that nowhere in his report does Dr. Gibson identify mistakes in the application of statistical procedure. Lupia Expert Report at 18-19 [DEV 5-Tab 5]. Dr. Lupia characterizes Dr. Gibson's critique as a "difference in point-of-view on how to categorize certain events that has nothing to do with statistical techniques *per se*.'' *Id.* at 19.

f. Dr. Gibson suggests that CMAG's shortcomings, detailed *supra* App. ¶ I.A, affect the level of credence one may give the *Buying Time* reports; however, he advances no hypotheses demonstrating why any of CMAG's shortcomings affect the results of *Buying Time*. Gibson Expert Report at 7-9 [1 PCS] (noting that there are "many limitations to the CMAG data," but not suggesting the impact the limitations have on the results of *Buying Time* studies); Gibson Rebuttal Report at 5-7 [2 PCS] (stating he has no basis for verifying that the CMAG data base is accurate, that there is no way of knowing the characteristics of the missing airings, but concluding that the "apparent[]'' errors caution against

relying on the CMAG data for drawing conclusions on the nature of political communications); *see also* Goldstein Rebuttal Report at 23 [DEV 5-Tab 4] (stating that Dr. Gibson "does not even attempt to explain how these alleged limitations undermine the validity of the conclusions set forth in *Buying Time*''); Krasno Rebuttal Report at 5 [DEV 5-Tab 3].

g. The division of tasks between the authors of *Buying Time 1998* and Dr. Goldstein also calls into question the results of the study according to Dr. Gibson. Dr. Gibson posits that since the study's authors engaged in secondary analysis of the data provided by Dr. Goldstein their "understanding of the nuances and peculiarities of the data base" was "most likely limit[ed]." Gibson Expert Report at 6 [1 PCS]. Given the size of the database and "various data infirmities," Dr. Gibson finds it "extremely worrisome that the results [of *Buying Time 1998*] are so heavily dependent upon the limited skills of an author [Mr. Seltz] who is a novice analyst." *Id.* Dr. Krasno, as noted *supra,* explains that Mr. Seltz did not engage in data analysis, making "Professor Gibson's fear that he contributed findings to *Buying Time 1998* . . . unfounded." Krasno Rebuttal Report at 3 [DEV 5-Tab 3]. Dr. Lupia points out that "secondary analysis of data collected by others" is common in the political science discipline, and has been undertaken by Dr. Gibson himself. Lupia Expert Report at 19-20 [DEV 5-Tab 5] (citing two articles authored by Dr. Gibson which use "country-level electoral data" from a "historical archive" and a study conducted in 1954).

h. Criticism was raised that both studies relied on coding of advertisements conducted by university students. Gibson Expert Report at 9 [1 PCS]; *see also supra* App. ¶ I.D.4 (explaining the coders' role). Dr. Gibson finds troubling the following unanswered questions: "how the students were recruited, what expertise they had prior to being employed for

the project, whether the students had been exposed to Dr. Goldstein's classes, whether the students had ideological and/or policy commitments to a particular outcome in the project, etc." *Id.* He also believes the fact the student coders were not trained "is a flaw of considerable proportion." *Id.* at 10. This is due to the fact that they were asked to make subjective judgments, and without training it is unknown whether or not they were competent to make such judgments. *Id.* at 18; *but see id.* ("[C]oding these advertisements is often simply difficult, irrespective of one's training and experience."); *see also* Holman Dep. at 73, 80 [JDT Vol. 10] (acknowledging the subjective nature of determining the purpose of a political advertisement). Dr. Gibson also notes that undergraduate students at Arizona State University or the University of Wisconsin are "not a representative sample of the 'average viewer,' and in the absence of training, the students were apparently free to exercise unstructured discretion in coding the ads .... [W]ithout training, practice coding, and discussion of coding rules based on the results of the practice coding ... I do not believe that undergraduate student coders can make accurate assessments on highly subjective characteristics of these ads." Gibson Expert Report at 10 [1 PCS]. Dr. Krasno responds, stating that

> it is likely a training program would have caused complaints that Dr. Goldstein and I were attempting to impose our standards on the coders. Given the alternatives, I felt [foregoing formal training] was preferable, especially since we were hoping for a (reasonably informed) ordinary viewer's impression of the ads. Limited pre-testing of the coding instrument showed that training was unnecessary because coders were apparently able to understand and answer the questions without further explanation.

Krasno Rebuttal Report at 5 n.4 [DEV 5-Tab 3]. Dr. Goldstein notes that Dr. Gibson's criticism in this regard is speculative, especially given the fact "he chose not to conduct

his own survey, using his own coders and his own training techniques, and compare it to the results reached by the undergraduate coders." Goldstein Rebuttal Report at 31 [DEV 5-Tab 4]; *see also* Lupia Expert Report at 33 [DEV 5-Tab 5] ("In this case, such a replication would have been relatively simple to conduct ... and would have allowed the [Gibson] report to rely less on speculation when alleging that measurable attributes of Goldstein's coders affected the data collection or analysis."). Dr. Goldstein states the lack of training was "a deliberate choice that is well-supported by social science principles .... aimed at getting the untutored common-sense impression of the coders, while minimizing the possibility of biasing coders with any preconceived notions that might have been implicit in a set of instructions." Goldstein Rebuttal Report at 32 [DEV 5-Tab 4]. Formal training, Dr. Goldstein asserts, "would only undermine the independence of the coders' assessments and possibly introduce systematic bias into the survey." *Id.* The lack of training also made it easier to "simulate ... the experience of a typical viewer watching the ads at home." *Id.* In terms of the representativeness of the coders, Dr. Goldstein comments that "the use of undergraduate subjects in studies measuring subjective perceptions of external stimuli is well- established and accepted social science procedure." *Id.* at 33. The students who coded the 1998 data were undergraduate honors students at Arizona State University, while six undergraduate students enrolled in Dr. Goldstein's upper- level Interest Group course at the University of Wisconsin coded the 2000 data. *Id.* According to Dr. Goldstein, the coders were not informed that the Brennan Center would be using their data to study the effects of campaign finance legislation, and he does not believe he "ever expressed to them any policy preference as to the desirability or undesirability of campaign finance legislation, either in the classroom or during the coding process." *Id.* at 34. Dr. Goldstein notes that if his involvement in the project suggested anything to the coders, it would have

been that the project was about the tone of political advertising, one of his primary scholarly interests. *Id.* In terms of the representativeness of the coders, Dr. Lupia states that "only if we had evidence that the way in which the undergraduates were unrepresentative caused *Buying Time*'s claims to differ from what a representative population would have produced" would there be a basis to believe the coders' unrepresentativeness threatened the quality of the data, but the Gibson "report presents no such evidence." Lupia Expert Report at 35 [DEV 5-Tab 5]. Lupia also notes that "in the field of psychology . . . important discoveries about mental states such as attitudes are often generated from studies that ask undergraduates to answer opinion questions after viewing paper-based stimuli. This practice has wide acceptance in social science and is the source of many important and socially valuable discoveries." *Id.* at 36; *see also* Holman Dep. at 241-42 [JDT Vol. 10] (noting "it's common practice to use students as survey respondents especially in political work").

i. Dr. Gibson challenges the reliability, or accuracy, of the coded data. Gibson Expert Report at 11 [1 PCS]. Dr. Gibson appears not to be concerned about the coding of objective characteristics of the advertisements. *Id.* ("Entirely objective characteristics of the ads (e.g., whether a telephone number is mentioned in the text of the ad) present few threats to reliability.") (footnote omitted). His main concern is over the coding of "subjective and judgmental" characteristics. *Id.* at 12. He provides Question 6 as an example:

> 6. In your opinion is the purpose of this ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?
>
> 1. Provide information or urge action (If so, skip to Question #19)
>
> 2. Generate support/opposition for candidate

> 3. Unsure/unclear

Id. at 12 (citing *BT 1998* [DEV 47]) (emphasis in original). This question appears in *Buying Time 2000* as Question 11 except that the Buying Time 2000 version does not bold "particular candidate" and does not ask the coder to skip Questions. *See* Goldstein Expert Report App. F [DEV 3-Tab 7]. Dr. Gibson notes that it is not always readily apparent who the sponsor of the advertisement is, making it difficult for the coder to know whose purpose he or she is supposed to be evaluating. Gibson Expert Report at 12 [1 PCS]. This problem is exacerbated by the lack of "explicit guidelines for how to ascertain an 'ad's purpose.'" *Id.* To demonstrate the subjectivity of the question, Dr. Gibson points to an advertisement run in Wisconsin which highlights Senators Herb Kohl and Russell Feingold's positions on partial birth abortion and asks the viewer to call them. *Id.* at 12-13. To Dr. Gibson "it seems obvious that the central focus of the ad is on the policy issue of whether to ban partial birth abortions . . . . One might reasonably conclude that one purpose of the ad was to elicit support for the National Pro-Life Alliance. The most reasonable overall assessment of this ad is that it is an example of issue advocacy by an interest group" *Id.* at 13-14. Holman, in an email, wrote that the ad "reads to me like a genuine issue ad," *id.* at 14 (citing Holman Dep. Ex. 14), but he concludes that it is an electioneering advertisement, Holman Dep. at 67 [JDT Vol. 10]. Both *Buying Time* studies treat the advertisement as an electioneering advertisement, but Dr. Goldstein in his expert report treats the broadcast of the advertisement in 2000 as a genuine issue advertisement.[199] Gibson Expert Report at 14 & n.13 [1 PCS]; *see also* Shays Dep. at 121 [JDT Vol. 29] (noting he finds the advertisement to be "powerful" and that "it should be run, but it was clearly designed to influence an election");

[199] Dr. Goldstein's explanation for this divergence in treatment is discussed, *supra* App. ¶ I.C.7; *see also infra* App. ¶ I.D.8.c.

McLoughlin Dep. at 42 [JDT Vol. 20] (stating his personal view is that the advertisement is a "genuine issue ad"). Given the subjective nature of this task, Dr. Gibson states that "certain procedures are essential so that the reliability of the data collected can be assessed." Gibson Expert Report at 16 [1 PCS]. According to Dr. Gibson, there is "no assessment whatsoever of intercoder reliability [for *Buying Time 1998*]. Thus, unlike academic research based on subjective coding, no empirical evidence exists to indicate that the coders' subjective assessments of these ads were accurate." *Id.* at 18. Dr. Gibson finds this to be a "serious flaw." *Id.* Dr. Lupia responds arguing that the "practice of treating answers to opinion questions as objective phenomena is common in science." Lupia Expert Report at 38 [DEV 5-Tab 5] (describing an article co-authored by Dr. Gibson, the main conclusion of which is based on a survey where participants were asked about how they described their own identities). He notes that Question 6 begins with "In your opinion," and seeks to understand how the advertisements are perceived. *Id.* at 37. In addition, Lupia questions the basis for Dr. Gibson's claim that "the most reasonable overall assessment" of the Wisconsin partial birth abortion advertisement is that it is pure issue advocacy, because Dr. Gibson gives no clear explanation of this judgment. *Id.* at 40.

j. Dr. Gibson explains the importance of reliability in the *Buying Time* context. He maintains that the miscoding of a single advertisement could have "quite large consequences for the statistical results." Gibson Expert Report at 22-23 [1 PCS]. He proposes that if Advertisement #11 was coded as promoting issues rather than a candidate, the percentage of pure issue advertisements in the *Buying Time 1998* data set would rise six percentage points. *Id.* This, Dr. Gibson argues, demonstrates the volatility of the data set. *Id.* at 23. As Dr. Gibson notes, he is not claiming for purposes of this argument that Advertisement #11 was coded in error; he is

merely showing how one *hypothetical* error could affect the data. *Id.* at 22 n.24.

k. Dr. Gibson also challenges the validity of the *Buying Time 1998* data. Gibson Expert Report at 17 [1 PCS]. By this, Dr. Gibson means that coders may be consistent in their coding, but their coding may be incorrect. *Id.* Specifically, he suggests that:

> coders must seek easily discernable 'cues' in the advertisements as a means of making the required judgment. Since the presence of a political figure who seems to be a candidate is a readily accessible cue, the coders then develop an implicit decision rule that says: 'when a political figure is depicted in the ad, the ad involves electioneering.' Using this rule, the variable might be reliably coded. But this does not mean that the data are *valid,* since political figures appearing in ads could well be doing something other than electioneering.

Id. (emphasis in original). Dr. Lupia counters that Dr. Gibson's argument misrepresents what the coders were asked to do. Lupia Expert Report at 39 [DEV 5-Tab 5]. He argues that the question seeks the coders' perceptions of the purpose of the advertisements, not the advertisements' true purpose. *Id.* Just because coders' perceptions may not comport with reality does not threaten the validity of the data, because the survey seeks the coders' mental impressions. *Id.* However, when codings were changed on Question 6, the mental impressions of the coders, which were sought by the question, were overruled. Goldstein Dep. (Vol 2) at 208-209 [JDT Vol. 8].

l. Dr. Gibson puts forth the theory that "the confusion in the instructions regarding Questions 7 through 18 may have introduced a degree of bias into how the students coded Question 6 by suggesting that any advertisement that included the name of a candidate should be coded as having a purpose

of promoting or opposing a candidate." Gibson Expert Report at 30 [1 PCS]. Dr. Gibson states that

> analysis reveals that *fully 97.7% of* [group-sponsored airings having a 'purpose' of generating support or opposition to a candidate] *were also coded as mentioning candidates*. The most important conclusion I draw from this analysis is that mentioning a candidate and promoting a candidate are virtually the same thing, as these data were coded by the undergraduate students (and/or Professor Goldstein). It seems highly likely to me that the student coders coded these three questions (6, 7, and 8) virtually simultaneously: A candidate (or what the coder thought was a candidate) was observed in the ad, and then Question 6 was coded as electioneering (in part because the coders knew that the presence of a candidate was not coded if Question 6 was coded as providing information), and then the student made the determination of whether the candidate was 'the favored candidate' (Question 7) or the 'favored candidate's opponent' (Question 8). Thus, the entire relationship—empirical and logical—between Questions 6 and Questions 7, [sic] and 8 renders the data set of little utility for answering important questions about these ads and airings.

Gibson Expert Report at 30 [1 PCS]; *but see id.* at 55-56 (characterizing his own argument as "indirect evidence or conjecture"). Dr. Krasno responds to Dr. Gibson's finding that 97.7 percent of advertisements found to be electioneering commercials mentioned candidates by observing "[g]iven their goal of helping candidates, it would be surprising to discover that electioneering ads do not identify candidates." Krasno Rebuttal Report at 10 n.13 [DEV 5-Tab 3]; *see also* Goldstein Rebuttal Report at 27 [DEV 5-Tab 4] (stating that "it is difficult to imagine an ad intended to promote or oppose a candidate that did *not* mention that candidate") (emphasis in original). He also states that Dr. Gibson's theory that the two items were "cognitively connected .... ignores the fact that

candidate mentions are coded *after* the purpose of the ad, and that coders did score a number of ads that mentioned actual and apparent candidates in reasonably neutral ways as genuine issue advocacy." Krasno Rebuttal Report at 10 n.13 [DEV 5-Tab 3] (emphasis in original). Dr. Lupia finds Dr. Gibson's theory to be a "wild guess. It has no apparent scientific basis, which matters because the claim in question includes a very detailed statement about an exact sequence in coders' cognitive processes .... Moreover, I am quite familiar with the current scientific literature on the psychology of responses to opinion questions and this claim follows nowhere from it." Lupia Expert Report at 45 [DEV 5-Tab 5]; *see also* Goldstein Rebuttal Report at 28 [DEV 5-Tab 4]. He also comments that Dr. Gibson could have easily tested his theory by showing "one set of coders with the instructions regarding questions 7 through 18 visible while showing another set of coders Question 6 without the instructions or subsequent questions." Lupia Expert Report at 44 [DEV 5-Tab 5]. I observe that Question 6 on the *Buying Time 1998* coding sheets is the last question on the first page of the survey, with Questions 7 and 8 appearing on the following page. *See, e.g.*, Gibson Expert Report Ex. 7 [1 PCS]. The coding sheets provided by Dr. Gibson do not indicate coders changed (*i.e.* crossed out) their coding of Question 6 for advertisements from issue advocacy to electioneering after seeing Questions 7 and 8 on the following page.

m. Plaintiffs challenge other aspects of Question 6 of *Buying Time 1998*. They note that the words "particular candidate" are printed in bold type, which Dr. Krasno states was done because he wanted the coders "to be thinking of candidates" when answering the question. Krasno Dep. at 123 [JDT Vol. 14]. Dr. Krasno explains that the bold type was meant to "make certain that the coders paid special attention to the appearance of candidates in these ads, so that they answered the question with respect to candidates, not with

respect to something else." *Id.* at 122-23. The corresponding question used for *Buying Time 2000* did not include the bold type.

n. Dr. Gibson states that "it is apparent to me that no single *Buying Time 1998* Data Set exists. This is in part due to the fact that Dr. Goldstein was (and may still be) continuously making changes in the codes assigned to individual ads and airings." Gibson Expert Report at 11 [1 PCS]; *see also id.* at 5 ("[T]he data set is continuously being manipulated and changed . . . "). Dr. Gibson suggests that the only codes altered were those "undermining the preferred conclusions," introducing "asymmetrical bias . . . in the data set." *Id.* Dr. Gibson makes the same allegation with regard to the *Buying Time 2000* data set. *Id.* at 50 ("[T]his data set, like the 1998 data, is continuously being changed."). Dr. Krasno explains that the short time frame of the study "inevitably meant that small changes to the data set would continue even after the release of *Buying Time 1998*." Krasno Rebuttal Report at 4 [DEV 5-Tab 3]. He claims that such changes are quite typical, and that "[v]irtually every provider of large data sets, from the National Election Studies to the Commerce Department, prepares versions of their data and continues to fix problems in subsequent releases." *Id.* The changes, Dr. Krasno maintains, reflect "the gradual filling in of missing data and the discovery of internal contradictions. There is no evidence at all in Dr. Gibson's report that any of the changes in the successive versions of the data that he examined had more than a trivial impact on his results or on those reported in *Buying Time 1998*." *Id; but see* Goldstein Dep. Ex. 17 (email authored by Holman stating that the "missing data category is uncomfortably large in the 1998 database"). Dr. Goldstein also notes that each *Buying Time* database consists of 40 million data points, and that "errors are inevitable in any database of this size." Goldstein Rebuttal Report at 37 [DEV 5-Tab 4]. He claims that Dr. Gibson's suggestion that these errors invalidate the database fails to make the distinction

between random error and non-random error (or "systematic" bias). *Id.* Dr. Goldstein claims that it is "universally recognized that random error does not undermine the validity of a data set because random error, by definition, occurs in all directions," and that such errors "are expected to cancel each other out." *Id.* Therefore while random errors "may make the coding of a particular data point inaccurate, their aggregate effect over the whole data set is not expected to undermine conclusions." *Id.* According to Dr. Goldstein, Dr. Gibson "typically does not specify whether . . . alleged errors were random or systematic," and concludes that "the great majority of the errors that Dr. Gibson alleges are, at most, the result of random 'noise' which would not have systematically biased the study's results or undermined its validity." *Id.* at 38. Dr. Goldstein states that the production of several versions of the *Buying Time* databases is explained by the fact that "social science researchers, like all prudent people, periodically back up their work when using computers." Goldstein Rebuttal Report at 9 [DEV 5-Tab 4]. Dr. Goldstein provides two explanations for the variances in data between the two data sets. First, some differences may be the result of "routine 'cleaning' of the data sets." *Id.* at 10. Dr. Goldstein says that it is "standard social science practice to clean a data set by correcting apparent errors after the codes have been entered into the database." *Id.* (citing Herbert F. Weisberg, Jon A. Krosnick & Bruce D. Bowen, An Introduction to Survey Research, Polling, and Data Analysis (3d ed. 1996)). Corrections were made to "wild codes- that is, entries for which no corresponding code existed in our codebook." *Id.* at 11. Dr. Goldstein and his assistants also "corrected logically inconsistent answers . . . [and] also filled in missing data for some ads on a number of objective questions, such as candidate mention, in both the 1998 and 2000 databases." *Id.* More substantial differences can be attributed to the fact that Dr. Goldstein "continued updating and revising [his] own copy of the database as part of [his] continuing scholarly

work." *Id.* at 11-12. Subsequent discoveries of miscodes of mostly contextual errors and 100 missing advertisements from the CMAG data set were added to Dr. Goldstein's version of the 2000 database. *Id.* at 12. Dr. Lupia reviewed the multiple databases and concludes that the changes are transparent and he finds no reason to conclude that Dr. Goldstein has attempted to hide anything. Lupia Expert Report at 22 [DEV 5-Tab 5]. Lupia agrees that Dr. Gibson's concern is a legitimate one; however, "[l]arge academic databases change for legitimate reasons, so the mere existence of the relative small changes cited in the [Gibson] report provide no basis to negate the project's credibility." *Id.* at 23. To Lupia, the important question is "why and how the changes were made," and Dr. Gibson's suggestions of illegitimacy are, in Lupia's opinion, "of varying and questionable credibility." *Id.*

o. Dr. Gibson examined "the actual student coding sheeting for 25 of the 1998 storyboards and . . . compared them to the 'final' version of the 1998 data set." Gibson Expert Report at 15 [1 PCS]. Focusing on Question 6, he found that the original student codings of eight advertisements as "genuine issue advertisements" had been changed to electioneering advertisements. *Id.* These eight advertisements were aired over 2,400 times, significantly changing the results of the survey. *Id.* Dr. Gibson is troubled by the fact that the changes were "entirely asymmetrical: In not a single instance in these storyboards was a change made on an ad originally coded as having candidate support or opposition as its 'purpose.'" *Id.* He asks: "[s]ince no documentation of how individual ads were selected for reconsideration by Professor Goldstein has apparently been produced, one is left wondering why all of these changes could have the same effect." *Id.* Dr. Krasno's explanation of the changes to the advertisements is detailed *infra*, App. ¶ I.D.7.r.(3). Dr. Lupia states that Dr. Gibson's

Report is subject to the same criticism with regard to his analysis of this matter. Lupia asks:

> why 25 storyboards and not more or less were examined. We are not told how these 25 cases were selected. Were they selected at random, were they given to Dr. Gibson by counsel (as is true in an analogous replication attempt . . .), or were they chosen by some other procedure? . . . Indeed, the [Gibson] report provides no basis for rejecting the hypothesis that the 'asymmetry' claim is an artifact of the cases being selected in a way that is biased toward this [sic] generating this particular result.

Lupia Expert Report at 41 [DEV 5-Tab 5].

p. In his report, Dr. Gibson discusses Question 22 on the coding sheet. The Question reads:

> 22. In your judgement, is the primary focus of this ad on the personal characteristics of either candidate or on policy matters?
>
> 1. Personal characteristics 2. Policy matters
>
> 3. Both
>
> 4. Neither

Gibson Expert Report at 31-32 [1 PCS]. Dr. Gibson observes that 98.1 percent of the advertisements aired within 60 days of the election were found to focus on policy matters, which means that "many ads were coded in Question 6 as promoting candidates but also as being 'primarily' focused on policy matters in Question 22." *Id.* at 32-33. Dr. Gibson finds this result contrary to what one might expect. *Id.* at 32. He then analyzes both questions and finds Question 22 to be more valid and reliable. Question 6, reproduced *supra*, App. ¶ I.D.7.i, does not provide coders the option of finding that the advertisement promotes *both* issues and candidates, forcing coders "to make a dichotomous judgment about the ad's 'purpose.'" *Id.* at 33-34. Dr. Gibson also observes that

"Question 6 does not ask the coder to discern the 'primary' purpose of the ad [it asks coders to provide their opinion on the advertisement's 'purpose']. Indeed, the question provides no guidance whatsoever as to how to code mixed- content ads." *Id.* at 34. For Dr. Gibson, the structure of Question 22 is superior to that of Question 6 because it provides the options of "both" and "neither," not "forcing a choice between different parts of the manifest content of the ad ... by allowing a coding of 'mixed' content." *Id.* Furthermore, he finds Question 22's request for the advertisements' "primary purpose," as opposed to Question 6's request for the commercials' "purpose," "provides at least some guidance for how to make the judgment required." *Id.* Dr. Gibson concludes that "Question 22 is structured in such a way as to provide more reliable information than Question 6." *Id.* Dr. Gibson also observes that the advertisements coded as supporting or opposing candidates have "quite a number of characteristics of what the authors of *Buying Time 1998* refer to as 'genuine issue ads.'" *Id.* at 35. He finds that:

> 95.6 percent of advertisements supporting or opposing candidates urged the viewer to take some action; 74.3 percent of these were coded as providing a toll-free telephone number and only 2.9 percent were coded as providing no telephone number
>
> 45.7 percent were coded as addressing health care issues; 30.1 percent addressed taxes; 27.8 percent addressed Social Security.

Id. at 34-35. Based on these findings, Dr. Gibson concludes that: "1) The coding in Question 6 is deeply flawed; 2) When Question 6 and Question 22 clash (i.e., the coding attributes differ), the coding of Question 22 should be considered more valid and reliable; 3) According to the coding, the vast and overwhelming majority of the ads said to be examples of illegitimate electioneering (by virtue of promoting candidates) in fact were judged by their own coders to have

'policy matters' as their 'primary focus.'" *Id.* at 35. Dr. Krasno disputes Dr. Gibson's conclusion that Question 6 is deeply flawed, noting that "coders rated 99 percent of candidate ads (and 93 percent of party ads) as generating support or opposition for a candidate." Krasno Rebuttal Report at 10 [DEV 5-Tab 3] (citing *BT 1998* [DEV 47] at 41). This conclusion is bolstered in Dr. Krasno's opinion by the fact the coders were not asked to determine the sponsor of the advertisement and that the disclaimers on the storyboards provided to the coders were often difficult to read. *Id.* at 10 n.14. Dr. Krasno contends that an electioneering advertisement does not have to focus primarily on personal characteristics of a candidate. He notes that "political scientists routinely take the view that politicians frequently adopt and advertise policy positions in order to appeal to voters. *Id.* at 11 (citing as an example Anthony Downs, An Economic Theory of Democracy (1957)); *see also* Goldstein Rebuttal Report at 29 n.16 [DEV 5-Tab 4] (citing four articles for the proposition that "policy issues in electioneering ads is widely noted in the political science literature"); Seltz Dep. at 188 [JDT Vol. 28]. Dr. Krasno stated that the:

> best illustration of this point [is the fact that] coders rated 11 percent of candidate[-sponsored] ads as focused on the personal characteristics of the candidates, 64 percent as policy-related, and the remaining 25 percent as neither or both. If one assumes, as both common sense and FECA indicate, that candidates are wholly motivated by their desire to win election, then the problem with using q22 as Dr. Gibson would use it becomes obvious: it miscategorizes at least two thirds of candidate ads as not being electioneering. This is the same criticism that both editions of *Buying Time* level at the magic words test, that it does not work for the one

> group of ads whose purpose and category are already known, regardless of their language or style.

Id. at 11. Dr. Lupia comments that an advertisement's primary purpose (the question posed in Question 6) and its primary focus (the question posed in Question 22) do not have to be the same. To illustrate his point he notes that many beer commercials do not focus on the product, but rather people "engaged in a range of activities that we can call 'wild nights out.'" Lupia Expert Report. at 47 [DEV 5-Tab 5]. It would not be unreasonable to "perceive that the purpose of the ad is to get" the viewer to buy the beer, "but to judge its primary focus as wild times." *Id.* at 48. Dr. Lupia argues that, contrary to Dr. Gibson's assumption, individuals can make the same distinction for campaign advertisements, *i.e.* that their purpose is to get the person to vote for candidate X, but their focus is on issue Y. *Id.* Lupia also challenges the idea that the qualifier "primary" clarifies matters for the coders. He cites a study co-authored by Dr. Gibson based on a survey question on social identity that did not mention the word "primary," but concluded that the initial responses given revealed *primary* social identities. Lupia Expert Report at 51 [DEV 5-Tab 5] (quoting James L. Gibson & Amanda Gouws, Social Identities and Political Intolerance: Linkages within the South African Mass Public, American Journal of Political Science 278-92 (2000)). This, Lupia states, is "standard practice" and the Dr. Gibson "report provides no tangible evidence or scholarly reference that Question 6 is inconsistent with standard scientific practice." *Id.* at 52. In terms of Dr. Gibson's determination that Question 22 is superior to Question 6, Lupia notes that Question 6 does provide the coder with a third option of "unsure/unclear" and the Gibson Expert Report "offers no direct evidence on how answers to the questions would have changed had we allowed the responses 'both' and 'neither' in Question 6 or the response 'unsure/unclear' in Question 22." *Id.* at 48, 50. Lupia posits in response to the criticism that Question 6 failed to provide

guidance to the coders that providing instructions would open the study up to charges that the instructions themselves biased the coders' responses. *Id.* at 49.

q. Dr. Gibson observes, for the first time in his rebuttal report, that "[m] issing from the entire discussion of ads and airings in the expert reports submitted is any consideration of the people who consume these ads." Gibson Rebuttal Report at 24 [2 PCS]. He uses the "Gross Rating Points" variable in the *Buying Time* databases to assess the impact of BCRA on "the people who consume these ads." "Gross rating points are the sum of ratings for a particular time: if the local news is watched by ten percent of viewers with televisions, an ad run during the program represents ten gross rating points." *Id.* at 25 (quoting *BT 1998* [DEV 47] at 6). Starting with Krasno and Sorauf's Expert Report's finding that there were 713 "genuine issue advertisement" airings during the last sixty days of the 1998 campaign which depicted a candidate, Dr. Gibson found gross rating points for 707 of the airings. He found:

> that these 707 airings represent communications with a staggering number of household—30,108,857. Thus, were these ads (just the ads accepted by Dr. Krasno and Professor Goldstein as 'genuine issue ads') prohibited, over 30 million group-citizen political communications would be affected (and this figure is based on the quite conservative assumption that each household only has a single person viewing television).

Id. Dr. Gibson does not make a similar argument in relation to *Buying Time 2000*. For further discussion on this point *see* Findings ¶ 2.12.13.

r. *Buying Time 1998's Seven Percent Figure*

Buying Time 1998's claim that only seven percent of "genuine issue ads" in the 1998 campaign would constitute electioneering communications under BCRA is disputed.

(1) According to Dr. Jonathan Krasno, author of *Buying Time 1998*, the question he sought to answer was "what is BCRA's impact on pure issue ads?" Krasno Rebuttal Report at 12 [DEV 5-Tab 3]. Dr. Krasno aimed to determine if BCRA's framers' attempts to minimize the impact of BCRA on pure issue ads through timing and identification of candidates worked. *Id. Buying Time 1998* found that seven percent of all pure issue advertisements aired in 1998 identified a federal candidate and appeared within sixty days of the campaign. *Id.* at 13. This figure was determined by dividing the number of airings of genuine issue advertisements mentioning a federal candidate within 60 days of the election by the total number of genuine issue advertisements run in 1998. *Id.; see also* Seltz Dep. at 115-16 [JDT Vol. 28]. The Brennan Center stands by the seven percent figure, although for a period of time in 2001 it had questioned its accuracy. Holman Dep. at 142-43 [JDT Vol. 10]. During that period of time, the Brennan Center ran additional analyses and determined that seven percent of "unique issue ads- or in other words, ... special interest groups placing issue ads" produced in 1998 would be captured unfairly by BCRA, *id.* at 123, 144, and that 13.8 percent of all issue advertisement airings mentioning a candidate and broadcast within 60 days of the 1998 election were genuine issue advertisements, *id.* at 154-55.

(2) Plaintiffs object to the use of this denominator. Dr. Gibson finds:

> using a denominator of all issue ads broadcast in 1998 for these calculations is arbitrary and makes little sense. Why use January 1, 1998, as the starting date for the total pool of issue ads (i.e., the denominator)? Why not include ads from December 1997, or even the entire election cycle beginning in November 1996? Why not limit the denominator to ads shown in the last half of 1998? The ... selected ... denominator ... has no theoretical meaning.

Gibson Expert Report at 38 [1 PCS]; *see also id.* at 41 ("I can see no justification for making the denominator equal to all issue ads aired in 1998."). Furthermore, he argues that given his conclusion that more people are concentrating on political issues as elections draw near, discussed *supra* App. ¶ I.C.8, *Buying Time 1998*'s denominator, by using all issue advertisements run during the course of the year, makes "the assumption that ads aired anytime throughout the year are equally as valuable as ads aired in proximity to the election." Gibson Rebuttal Report at 27 [2 PCS]. He concludes that the "damage of prohibiting an ad within 60 days of an election cannot be ameliorated by allowing that ad to be broadcast at some other point throughout the year." *Id.* at 27-28. Dr. Krasno explains that the denominator reflects only advertisements run in 1998 because "we had no data from 1997 or the last weeks of 1996 to include in the denominator." Krasno Rebuttal Report at 14 [DEV 5-Tab 3]. He notes that the addition of such data into the denominator would simply "*decrease* the percentage of pure issue ads affected by BCRA" because all of those advertisements would have aired more than 60 days before the election and would therefore not increase the size of the numerator. *Id.* at 14-15 (emphasis in original); *see also* Krasno & Sorauf Expert Report at 62 [DEV 1-Tab 2] ("The data from which these estimates are derived cover broadcasting only during the 1998 and 2000 calendar years, not the thirteen-plus months preceding them. Were we able to factor in the total number of pure issue ads that appeared between elections, the percentage of pure issue ads affected by BCRA would decline."). Dr. Gibson also suggests the better denominator, and one that is not arbitrary, is that used in *Buying Time 2000;* namely, all airings of issue advertisements during the last sixty days of the campaign which also depict a candidate. Gibson Expert Report at 39 [1 PCS]. The formula answers the

question: If one were to assume all issue advertisements mentioning a candidate in the last 60 days of an election campaign had an electioneering purpose, what percentage of the time would this assumption be erroneous? *Id.* at 38-39. By contrast, the *Buying Time 1998* formula answers the question: "What percentage of total ads run throughout the year that mentioned a candidate by name and were coded as providing information or urging action appeared *within* 60 days of the election, rather than *earlier than* 60 days before the election?" *Id.* at 39 (emphasis in original). Dr. Krasno believes that Dr. Gibson's denominator would vary in size "with the amount of candidate-oriented issue advertising before an election. This is particularly relevant because of the volume of candidate-oriented issue ads devoted to presidential campaigns. The result, of course, is highly unstable estimates of BCRA's impact from year to year." Krasno Rebuttal Report at 15 [DEV 5-Tab 3]. The effect of using the *Buying Time 1998* denominator is that the percentage is affected not only by the amount of genuine issue advertisements run within 60 days of the election, but also the number of electioneering advertisements run during that time. *Id.* at 16 n. 26. When Dr. Krasno applied Dr. Gibson's denominator to the *Buying Time 1998* data he found 14.7 percent of genuine issue advertisements would be unfairly captured.[200] *Id.; see also*

[200] Dr. Gibson, using a different data set than Dr. Krasno, found that by taking *Buying Time 1998*'s "flawed numerator and using the Brennan Center's own figures for calculating the proper denominator (airings within 60 days [of the election]), 16.5 % of the group ads were 'genuine issue ads' (as defined by the Brennan Center) . . ." Gibson Expert Report at 42 [1 PCS]. He goes on to reject this figure because he "does not accept the numerator." *Id.* He also finds that by using the data set he believed was the "final" version 25.7 percent of issue advertisements aired during 1998 mentioned a candidate and were broadcast within 60 days of the election were "genuine" issue advertisements. *Id.* at 37. Dr. Krasno states that this figure is incorrect because the data set used is incorrect, resulting in a numerator "four times too large," and that based on his study with Sorauf, he now calculates the correct figure to be 6.1 percent. Krasno

Krasno & Sorauf Report at 60 n.143 [DEV 1-Tab 2]; *id.* App. at 3 (providing the calculation: 713 airings of three distinct genuine issue advertisements[201] mentioning a candidate and aired within 60 days of an election constitutes the numerator; the denominator is the 4847 airings of issue advertisements mentioning a candidate within 60 days of the election). Dr. Krasno also notes that Dr. Gibson's calculations, finding 44.4 percent or more of genuine issue advertisements unfairly captured by BCRA to be, by Dr. Gibson's own report, a result of his changes to the numerator as well as to the denominator. *Id.* at 16; *see also* Gibson Expert Report at 40 [1 PCS]. Dr. Gibson notes that the discrepancy between his figures and that of *Buying Time 1998* "is due in part to the use of different denominators," but does not indicate the extent to which the change to the denominator, as opposed to his changes to the numerator, explains the discrepancy. Gibson Expert Report at 40 [1 PCS]. Dr. Lupia observes that both denominators answer questions that are different but finds both to be reasonable. "If I were asked to assess the proposed regulation's restrictiveness, the [Gibson] report's fraction could provide information about the impact during a particular time period, while *Buying Time* 1998's fraction could provide a better measure of the regulation's impact on issue advocacy more generally." Lupia Expert Report at 25 [DEV 5-Tab 5]. Lupia states that Dr. Gibson's denominator is

Rebuttal Report at 19 & App. [DEV 5-Tab 3]; *see also* Krasno & Sorauf Expert Report at 60 [DEV 1-Tab 2]. Dr. Gibson's problems with the numerator are discussed *infra*, App. I.D.7.r.(3).

[201] One of these advertisements, "HMO said No" was aired a total of 455 times (118 times in Greensboro, 126 times in Raleigh-Durham, and 211 times in St. Louis). Krasno & Sorauf Expert Report App. at 3, 20 [DEV 1-Tab 2]. We were unable to find additional information about the other two advertisements, "CCS/No Matter Who" and "CENT/Breaux." *Id.* In 1998, St. Louis had 1,110,290 television households, Raleigh-Durham had 834,260, and Greensboro had 584,900. Gibson Rebuttal Report Ex. 2 [2 PCS].

no less arbitrary than that of *Buying Time 1998*. *Id.* at 26. Holman comments that the *Buying Time 1998* denominator is "a justifiable way" of determining the impact of BCRA on genuine issue advertisements, although he did not use the same one for *Buying Time 2000*. Holman Dep. at 140 [JDT Vol. 10]. For Holman, the *Buying Time 1998* calculation is "not incorrect. It's a different way of assigning a number to measure a phenomenon." *Id; but see id.* at 153-54 (stating that the text of *Buying Time 1998* relating to the seven percent figure is "[m]isleading" and "ambiguous" in that it did not identify clearly to what it referred).

(3) Plaintiffs' and Defendants' experts also disagree as to what the appropriate numerator should be. Dr. Gibson rejected the *Buying Time 1998* numerator because based on the data he was provided he concluded that eight advertisements aired 2,405 times in the last 60 days of the campaign were originally coded as promoting an issue or urging action (genuine issue advertisements) but were overruled by Dr. Goldstein and recoded as electioneering advertisements. Gibson Expert Report at 42 [1 PCS]. When Dr. Gibson added in these advertisements he found that "nearly two-thirds of the group ads that aired within 60 days of the 1998 election were coded by the students as 'genuine issue ads.'" *Id.* at 43. Dr. Gibson in his Rebuttal Report revises this figure based on information provided during the course of the litigation, which indicated that over a quarter of the advertisements he added to the numerator did mention candidates, resulting in a figure of 50.5 percent. Gibson Rebuttal Report at 23 [2 PCS]; *see also* Krasno Rebuttal Report at 17-18 [DEV 5-Tab 3] (describing this error). Dr. Gibson concludes that "this 50.5 % figure represents the statistical floor ... the 64 % figure cited in my report ... provides the ceiling." Gibson Rebuttal Report at 24 [2 PCS]. Dr. Gibson, in his Supplement Report, states that Dr. Krasno had produced additional data files which included an earlier version of the data set upon which he had relied. Gibson

Supplement to Rebuttal Expert Report of October 7, 2002: 1998 Data ("Gibson Supplemental Report") at 1 [2 PCS]. The data showed that one of the eight advertisements Dr. Gibson alleged had been recoded (from "genuine issue" to "electioneering") had originally been coded as promoting the election or defeat of a candidate, and that another was missing data as to the nature of the commercial. *Id.* at 4. As a result of excluding the airings of these two commercials, Dr. Gibson calculates that his "ceiling" fell to 60 percent, and his "floor" remained unchanged. *Id.* at 5-6. Dr. Krasno rejects the inclusion of any of the airings of these eight advertisements in the numerator. *See* Krasno Response to Professor Gibson's Supplemental Rebuttal (Nov. 13, 2002) ("Krasno Response"). He objects to the notion that the recoding "reflects a deliberate effort to manipulate some of the results reported in *Buying Time 1998*," stating that the recoding aimed to "make the data set as sensible and accurate as possible." *Id.* at 1, 2. Dr. Krasno explains that the decision to recode five of the advertisements was based on their contradictory codings. *Id.* at 2. The survey was constructed so that when a coder found that an advertisement's purpose was to "provide information or urge action" (in other words, was a genuine issue advertisement) in Question 6, the coder was supposed to skip the next 12 questions. *Id.* at 2; Gibson Supplemental Report Ex. 7 [2 PCS]. For five of these advertisements, student coders found the advertisement provided information or urged action, but went on to answer the next 12 questions. Krasno Response at 2. In addition, Dr. Krasno states that "all of these ads were scored in a parallel process on another variable, 'favcan,' as favoring a Democratic or Republican candidate. Again, the potential conflict between question 6 and favcan should have attracted attention as the data set was being prepared." *Id.* Dr. Krasno argues that a review of the storyboards for these five advertisements, as well as other contextual factors such as where and when they were aired, makes it clear that they should be coded as "electioneering."

Id. at 2-4. As for the final advertisement concerning Senators Herb Kohl and Russell Feingold's positions on partial birth abortion, Dr. Krasno admits that whether or not it is a genuine issue or electioneering advertisement is a "close call," but the fact that it appeared only six times in 1998 means its coding has "no real effect on any calculations of BCRA's impact." *Id.* at 3; *see also supra* App. ¶¶ I.D.7.i, I.D.8.c (discussing the advertisement). Dr. Krasno believes that the "notion that a small handful of mistakes must be perpetuated because they were once made is both ludicrous and an extraordinary departure from the usual practice of compiling data sets. Dr. Gibson's argument would be more credible if he offered any explanation for why these commercials really are pure issue ads." Krasno Response at 5.

(4) Dr. Lupia weighs in on the fraction debate, contending that the Gibson and *Buying Time* reports "are reasonable conceptualizations of the question about how the proposed regulations will affect groups in the present and future if groups act exactly as they did in the past. If, however, we want to evaluate the regulations' likely future impact we should consider the possibility that groups will adapt to the new regulations in different ways." Lupia Expert Report at 26 [DEV 5-Tab 5]. Both sides seek to predict the impact BCRA will have if no one alters their behavior. Lupia concludes that to "the extent that affected groups are able to choose [to alter their behavior], both estimates in the denomination debate may exaggerate the extent to which this aspect of the new regulation will restrict the groups' abilities to express themselves in the future . . . . To the extent that we agree that such groups will adapt in various ways, the credibility of the high-percentage estimates of the likely future impact of the proposed regulations on interest groups is severely undermined." *Id.* at 27.

8. *Criticism of Buying Time 2000*

a. Many of Dr. Gibson's criticisms of *Buying Time 2000* are similar to those made of *Buying Time 1998* and are addressed *supra*, App. ¶ I.D.7.

b. Dr. Gibson states that the *Buying Time 2000* data base "has numerous errors and inconsistencies in it," and comments that these changes preclude him from replicating the findings of *Buying Time 2000*. Gibson Expert Report at 46, 47- 48 [1 PCS].[202] He is troubled by the fact that Dr. Goldstein changed the coded "purpose" of 62 out of 338 advertisements, *id.* at 52, questions the motivation behind the changes, and asks what standards Dr. Goldstein employed in making the changes, *id.* at 53; *see also id.* at 47 n.43, 64 (concluding from a review of email correspondence between *Buying Time 2000* researchers that they "were committed to drawing a particular set of substantive conclusions from the data. When the conclusions were not forthcoming, the data was scrutinized further and alterations were made in the data base."). Dr. Goldstein states that "most of the 62 'changes' [Gibson] identifies in the 2000 database are not changes at all, but rather original student coding of additional CMAG storyboards that had not previously been coded at all, and were not part of the database used by the authors of *Buying Time 2000*." Goldstein Rebuttal Report at 4 [DEV 5-Tab 4]. The problem stems from Dr. Gibson's use of the wrong database; he does not analyze the *Buying Time 2000* database, but rather "a later iteration of [Dr. Goldstein's] own version of the database containing [his] own after-the-fact updates and re-codes, including additional ads later received from CMAG . . . . [N]one of this re-coding ever made its way into

[202] Dr. Goldstein testifies that he does not have the original student coding for this study, explaining that his "political science department . . . mistakenly deleted a big chunk of out files, including our access database." Goldstein Dep. (Vol.2) at 129 [JDT Vol. 8].

the *Buying Time 2000* report."[203] *Id.* at 14-15. Dr. Goldstein also takes exception to the charge that he deliberately changed the data in order to decrease the number of pure issue advertisements, calling it "baseless." *Id.* at 4. In addition, Dr. Goldstein notes that he reevaluated the coding of 30 advertisements in the 2000 database in his post-*Buying Time 2000* academic research having nothing to do with campaign finance or the *Buying Time* studies and "[i]n 26 of these instances, [] changed the coding from electioneering to genuine issue." *Id.* at 5, 14-15, App. A (listing advertisements changed or added to the database and the changes made to each). Dr. Goldstein claims that for the *Buying Time 2000* database, he "did not change any of the student coders' responses to Question 11 in the data cleaning process." *Id.* at 16; *see also* Goldstein Dep. (Vol.2) at 57-59, 147-50 [JDT Vol. 8] (detailing cell phone conference call from the West Palm Beach Airport asking for his assessment of three advertisements which were subsequently changed from

[203] For example, Dr. Gibson challenges the *Buying Time 2000* finding that "[o]f all the group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4 % were found to be electioneering issue ads. In absolute numbers, *only three genuine issue ads (which aired a total of 331 times in the 2000 elections) would have been defined as electioneering communications* . . ." Gibson Expert Report at 61 [1 PCS] (quoting *BT 2000* [DEV 46] at 73 (emphasis in original)). Dr. Gibson finds that according to the database the three advertisements were only aired nine times, but the *Buying Time* authors reported 331 airings and a different data base that Dr. Gibson determines is the "original, student coded version" of Question 11 shows 1,082 airings.. *Id.* at 61-62. He declares that he "has confidence in none of these" figures. *Id.* at 62. Dr. Goldstein claims that if Dr. Gibson had used the correct database, "federal.sav," he would have been able to identify the three advertisements which comprise 331 airings. Goldstein Rebuttal Report at 21 [DEV 5-Tab 4] (finding advertisements # 627 (172 airings), # 1389 (81 airings), and # 2862 (78 airings)). He also used the database to identify "all ads run by interest groups that mentioned a candidate and aired within 60 days of the election," and using that as the denominator arrived at the same percentage as *Buying Time 2000*. *Id.* (dividing 331 by 53,840).

genuine issue to electioneering advertisements based on Dr. Goldstein's assessments). Dr. Lupia comments that Dr. Gibson fails to connect his bias concerns with actual changes in the database or demonstrate the effects directly. Lupia Expert Report at 58 [DEV 5-Tab 5]. As such, Lupia finds the charge that the investigators were committed to reaching a particular outcome to be "at best, premature and, with certainty, not proven in the [Gibson] report. *Id.*

c. Dr. Goldstein does find that three advertisements in the *Buying Time 2000* database "were re-coded on Question 11 from 'promoting a candidate' to 'providing information or urging action on an issue.'" Goldstein Expert Report at 16 [DEV 3-Tab 7]. One was a version of a "cookie cutter" advertisement run by CBM (numbered 1269), which was "extremely similar" to a number of other CBM- sponsored advertisements that (Goldstein thought) had all been coded as "electioneering." *Id.* This fact was brought to Dr. Goldstein's attention by the *Buying Time* authors and, concluding that it was not "meaningfully distinguishable from the other CBM ads, . . . [he] recoded it as electioneering." *Id.* The second was the National Pro-Life Alliance advertisement (numbered 2107) which mentioned Wisconsin Senators Kohl and Feingold. Again, the *Buying Time* authors told Dr. Goldstein that the advertisement was "virtually identical" to another advertisement run in Virginia mentioning then-Senator Charles Robb. *Id.* at 17. Dr. Goldstein reviewed the storyboards of the two advertisements and found them "not meaningfully distinguishable, and resolved the inconsistency by re-coding [the commercial] as electioneering." *Id.* The final advertisement changed was sponsored by the Rhode Island Women Voters (numbered 1367). The advertisement was originally coded as a "genuine issue advertisement" but changed by Dr. Goldstein after the *Buying Time* authors disagreed with the coding. *Id.* Dr. Goldstein believes that the advertisement "is clearly electioneering." *Id.* As noted *supra*, App. ¶ I.D.8.c, Dr. Goldstein recently discovered that the six

corresponding versions of Advertisement #1269 were originally coded as "genuine issue advertisements" by the students and later changed by the *Buying Time 2000* authors to "electioneering" commercials. Goldstein Dep. (Vol. 2) at 158-59 [JDT Vol. 8]. When these six advertisements are added to the analysis, which Dr. Goldstein terms "the most conservative standard estimate," one finds that 17 percent of the advertisements aired within 60 days of the election which identified a candidate were "genuine issue advertisements." *Id.* at 169. Defendants' experts personally disagree that all of these commercials are "genuine issue advertisements." *See* Holman Dep. at 82- 83 [JDT Vol. 10] (stating he considers Advertisement #1367 to be his "poster child of sham issue advocacy"); Goldstein Expert Report at 26 n.21 [DEV 3-Tab 7] (noting that he considers all the commercials with the exception of Advertisement #2107 "were clearly intended to support or oppose the election of a candidate").

d. Dr. Gibson raises essentially the same concerns about Question 11 in *Buying Time 2000* as he does for the practically identical Question 6 in *Buying Time 1998*, discussed *supra* App. ¶ I.D.7.i. Gibson Expert Report at 54-55 [1 PCS]. Many of the rebuttal arguments posted in paragraph I.D.7.i, *supra*, are aimed at this charge as well. *See supra* App. ¶ I.D.7.i. In addition, Dr. Goldstein argues that data from the 2000 election shows that coders "were [not] systematically biased toward coding ads mentioning candidates as electioneering as opposed to issue ads." Goldstein Rebuttal Report at 29 [DEV 5-Tab 4]. Dr. Goldstein states that "79.8 percent of the group-sponsored ads classified as electioneering were coded as having run within 60 days of the election, compared to only 18.7 percent of non-electioneering ads." *Id.* at 28. As one "would expect . . . that ads designed to promote or oppose a candidate would air relatively close to Election Day," this objective data, in Dr. Goldstein's opinion, corroborates the coding in Question 11

and demonstrates that Dr. Gibson's theory is incorrect. *Id.* at 28-29.

e. Dr. Gibson also makes the argument that *Buying Time 2000*'s Question 27, identical to *Buying Time 1998*'s Question 22, is superior to Question 11, for much the same reasons he posits for the superiority of *Buying Time 1998*'s Question 22 over the same study's Question 6. Gibson Expert Report at 56-61 [1 PCS]; *see also* App. ¶ I.D.7.p. He also claims that Question 27 is more reliable "because it does not seem to have been subject to the post-coding manipulations inflicted on Question 11." Gibson Rebuttal Report at 16 [2 PCS]. The coders found 78.8 percent of the group-sponsored advertisements had policy matters as their primary focus, and 17.6 percent had both policy matters and personal characteristics as their primary focus. Gibson Expert Report at 57 [1 PCS]; *see also* Gibson Rebuttal Report at 16 [2 PCS] (applying the denominator used in Dr. Goldstein's Expert Report to conclude 84.4 percent of "electioneering" advertisements had policy matters as their primary focus.) Many of the arguments made in App. ¶ I.D.7.p, *supra*, are directed at this charge as well. In addition, Dr. Goldstein responds by stating that "most electioneering ads seek to influence votes by portraying the favored candidate as espousing reasonable policy positions on hot-button issues like taxes . . . , and the opponent as having unreasonable or even dangerous positions on the same issues." Goldstein Rebuttal Report at 30 [DEV 5-Tab 4]. The data from the 2000 election shows that "53.3 percent of candidate-sponsored ads focused on policy issues rather than personal characteristics; an additional 35 percent focused on both policy and personal issues. Only 10.8 percent focused just on personal issues." *Id.* Furthermore, in 2000, 47.4 percent of advertisements using express advocacy terminology were coded as having a policy focus, 34.5 percent focused on both policy and personal issues, and 16.5 percent focused only on personal issues. *Id.* at 30-31. Dr. Goldstein concludes that Dr. Gibson's theory is

"disproved by the fact that both candidate ads and express advocacy ads, which everyone agrees are electioneering, themselves focus primarily on policy issues." Id. at 31.

f. Dr. Gibson attempts to demonstrate "the extent to which changes in a relatively small number of highly subjective codings can affect the results reported and the conclusions reached." Gibson Expert Report at 62 [1 PCS]. He does so by looking at 30 advertisements produced by counsel and assumes that they each "could fairly be coded as 'providing information.'" Id at 62-63. By treating them as such and adding them to the Brennan Center's 331 figure (which he rejects) he concludes that the so-called "genuine" airings constitute 24.1 percent of all the airings within 60 days of the election, which did not use express advocacy and mentioned a candidate. Id. at 63. He then comments that "if one assumed that airings presented within 60 days of the 2000 election, which mentioned candidates, but which did not mention 'magic words,' were intended to promote candidates . . . , one would be wrong, under this scenario, approximately 24% of the time." Id. (emphasis added); see also Gibson Dep. at 179-80 [JDT Vol. 7](confirming that he made no determination about how the advertisements should be coded); id. at 181 (stating he never looked at the storyboards for the 30 advertisements). This exercise leads Dr. Gibson to conclude that "changes in the coding of very small numbers of ads can change the results dramatically," "the current version of the 2000 data base supports many possible estimates of the number of ads with these characteristics," and "given all of the deficiencies of the data base and the coding on which it is based, the wisest course is to draw no conclusions whatsoever about these ads on the basis of the empirical evidence in the data base." Gibson Expert Report at 63 [1 PCS].[204] Dr.

[204] In his rebuttal report, Dr. Gibson adds to his 30 advertisement data set four additional commercials deemed by Goldstein's Expert Report to be genuine issue advertisements (Dr. Goldstein found six genuine issue advertisements run in 2000, and two were already in the 30 commercials chosen). Gibson Rebuttal Report at 15 [2 PCS]. By running a similar analysis, Dr. Gibson concludes that Dr. Goldstein's "estimates of the impact of the three criteria [60 days before the election, candidate mention, not supporting or opposing a candidate] are wholly dependent on subjective assessments of the 'purpose' of individual ads, assessments that are reasonably subject to debate." *Id.*

Goldstein finds Dr. Gibson's exercise with the 30 counsel-chosen advertisements to be "a remarkably bizarre manipulation of the data in order to artificially inflate Buying Time 2000's 'false positive' count." Id. at 22. Dr. Goldstein notes that "if we 'assumed,'" as Dr. Gibson did for the 30 advertisements, "that 100 percent of the BCRA-related group ads were genuine issue ads, then we could arrive at a false positive percentage of 100 percent." *Id.* Dr. Lupia questions the credibility of this argument given that it is based on 30 advertisements chosen by Plaintiffs' counsel, and Dr. Gibson does not reveal the method behind their selection. Lupia Expert Report at 57 [DEV 5-Tab 5]; *see also* Gibson Dep. at 180 [JDT Vol. 7](confirming he has no understanding of how the advertisements were selected); Goldstein Expert Report at 22 [DEV 3-Tab 7] ("[W]here-as here-such assumptions are based on nothing more than the self-serving conjecture of plaintiffs' counsel, any such percentage is meaningless.").

g. Dr. Gibson notes that unlike the *Buying Time 1998* study, "it appears that the 2000 project made some serious attempt to assess the reliability of the data collected by the student coders." Gibson Expert Report at 49 [1 PCS]. He evaluates reliability testing as detailed in an article published by Drs. Krasno and Goldstein, where they found that the recoders differed from the original coders on the Question 11 "purpose" inquiry in only one instance. *Id.* (citing Jonathan Krasno & Kenneth Goldstein, The Facts about Television Advertising and the McCain-Feingold Bill," 35 PS: Political

Science and Politics 207 (Jun. 2002).[205] The procedure involved the recoding of 250 advertisements, but Dr. Gibson questions "how these ads were sampled (e.g., random versus non-random selection) and who the coders were (e.g., expert versus novice)," and notes that "variable-by-variable reliability results for the full ad coding data set are not presented." *Id.* Without this information, Dr. Gibson cannot assess whether the "inter-coder reliability methods can be accepted as producing any useful information." *Id.* Dr. Goldstein discusses his efforts to assess inter-coder reliability which appear to be different from that discussed by Dr. Gibson. *See* Gibson Rebuttal Report at 9 n. 14 [2 PCS] ("It is unclear how [this test] relates to" the one described in the article published by Drs. Krasno and Goldstein). Dr. Goldstein describes a procedure whereby he randomly chose 150 unique advertisements, had them coded by five undergraduate students and "[i]n general, [] found inter-coder reliability to be extremely high." Goldstein Rebuttal Report at 34 [DEV 5-Tab 4]. Dr. Goldstein also conducted a more recent inquiry into the reliability of the coding of Question 11. He took all 350 advertisements in the data set that were sponsored by interest groups, "randomly selected 50[206] and asked 10 undergraduate students to code them on three attributes[:] ... 1) whether the ads 'generate support or opposition for a particular candidate' or 'provide information or urge action'; 2) their tone (attack, contrast, or promote); and 3) their focus (a candidate's personal attributes or policy)." *Id.* at 34-35. The original coders had found 64 percent of the sampled advertisements to generate candidate support, 26 percent to provide information or urge action, and for two percent of the advertisements they were unsure or

[205] The procedures and results of the inter-coder reliability test are produced as Appendix I to the Goldstein Expert Report.

[206] He later had to drop four because "their codes were missing from the original dataset." Goldstein Rebuttal Report at 35 [DEV 5-Tab 4].

unclear about the commercial's purpose. *Id.* at 35. The recoders agreed with the original codes 75 percent of the time, regardless of whether the original coding was "support or oppose a candidate" or "provide information or urge action." *Id.* at 35-36. The fact "that the coders agreed with the original code in 75 percent of the cases, *regardless of what that original code was,*" Dr. Goldstein asserts, means that "there is no hint of systematic bias in the original coding." *Id.* at 36. Dr. Gibson, in his rebuttal report, challenges this test. Since Dr. Goldstein was unable to discover the original coding database used in *Buying Time 2000,* Dr. Gibson questions whether or not the reliability exercise tested correlation between the recoders and the original coders, or the recoders and a manipulated data set. Gibson Rebuttal Report at 9 [2 PCS]. Next, Dr. Gibson challenges the sample used by Dr. Goldstein. He notes that the pool from which Dr. Goldstein selected the advertisements was "highly skewed" in that very few were coded as genuine issue advertisements. *Id.* at 10. Dr. Gibson finds that "any conclusions about whether this sort of ad [group-sponsored] was in fact reliably coded cannot be accepted on the basis of an examination of such a small number of ads." *Id.* He also posits that since genuine issue advertisements were "exceedingly rare" in the sample set that "it seems quite likely that even after coding only a few ads, the coders developed a strong expectation, implicit or explicit, that the next ad they coded would be an electioneering ad. It is very difficult to make subjective assessments of infrequently occurring events. Once a coder discerns a pattern in the responses to a subjective variable, it becomes difficult indeed for the coder to 'break the habit.'" *Id.*

h. The NRA criticizes the *Buying Time 2000* study for not including two 30- minute "news magazines" in the data which it claims are "genuine issue advertisements." Proposed Findings of Fact of the NRA and the NRA PVF ¶ 9. "If these airings had been considered, 34 % of the total volume of

speech that BCRA in 2000 would have covered in the 60 days prior to the general election would have been genuine issue advertisements." *Id.* One of these "news magazines" was titled "California." LaPierre Decl. ¶ 12 [NRA App. at 5]. "California" was aired 800 times in California from August 29, 2002 to November 5, 2000. *Id.* ¶ 14. "During the entirety of the 30-minute program, there was only one fleeting reference to a federal candidate for office. Specifically, during a short segment urging viewers to join the NRA and describing the benefits of membership, a cover of an issue of the NRA's magazine 'First Freedom' depicting Vice President Gore's image, then a presidential candidate, flashed on the screen for several seconds." *Id.* ¶ 13. One other NRA 30 minute "news magazine" would similarly would be "captured" by BCRA due to the inclusion of the "First Freedom" cover. NRA App. 917, 920, 924, 929 ("It Can't Happen Here) (also referring once to the "Clinton-Gore assault weapons ban"). The NRA does not allege that the study included other 30 minute advertisements, or that the CMAG monitors such commercial broadcasts. It does not indicate how other 30 minute "news magazines" it ran during 2000 would have affected the results of *Buying Time*. *See* Proposed Findings of Fact of the NRA and the NRA PVF ¶¶ 3-7.

II. AFL-CIO ADVERTISEMENTS RUN WITHIN 30 DAYS OF A PRIMARY ELECTION

A. Plaintiff AFL-CIO has put forth a number of examples of what they claim are "genuine issue advertisements" relating to pending legislation that BCRA would capture because the commercials ran on television and radio within 30 days of a primary election. AFL-CIO Br. at 10-11 (citing Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58-59). The advertisements cited to by the AFL-CIO ran in "flights," aimed at particular legislation pending at the time. Practically all of these flights consisted of a variety of "cookie-cutter"

advertisements, meaning advertisements that are virtually identical except that they reference different candidates. *See generally* Mitchell Decl. Ex. 1 [6 PCS].[207] Ms. Mitchell describes advertising campaigns comprising 29 different sets of cookie-cutter advertisements, some of which were run within 30 days of a named candidate's primary election. Mitchell Decl. ¶¶ 32, 34-36, 37-39, 40, 50, 58- 59 [6 PCS].[208]

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[207] Ms. Mitchell provides with her declaration as Exhibit 1 a chart listing all of the advertisements purchased by the AFL-CIO since 1995, which includes the advertisement's title, district where it aired, the candidate or officeholder mentioned, whether it was a radio or television advertisement, the issue(s) discussed, the commercial's audio and visual "call to action," the dates it was broadcast, the dates of the mentioned candidate/officeholder's primary and general election, and whether the advertisement was aired within 30 of the primary, or 60 days of the election date. *See* Mitchell Decl. Ex. 1 [6 PCS]; Mitchell Decl. ¶ 4 [6 PCS] (with some caveats, attesting that "Exhibit 1 is a substantially accurate list of the ads run by the AFL-CIO between 1995 and 2001."). Since the AFL-CIO brief cites to paragraphs from Ms. Mitchell's declaration, and Ms. Mitchell's declaration relies on the information contained in Exhibit 1, I look to both sources for information about these advertisements. In the event of inconsistency between Ms. Mitchell's testimony and the data in Exhibit 1, I rely on Exhibit 1 as its information is far more detailed and forms the basis for Ms. Mitchell's testimony. For example, in Paragraph 34 of her declaration, Ms. Mitchell states that "1991" ran in 28 media markets, identifying 3 candidates within 30 days of their primaries and cites to Exhibit 1 for support. *Id.* ¶ 34. However, Exhibit 1 shows advertisements aired in only 19 markets identifying one such candidate. *Id.* Ex. 1. I give credence to the information in Exhibit 1. In addition, in some cases two forms of the same advertisement were run in the same district against the same candidate. Unless the advertisements were identical, I have treated them as two separate cookie-cutter advertisements. *See e.g. id.* Ex. 1 at 33-34 (listing two "Couples" advertisements run in fourth Congressional district of North Carolina identifying Congressman Fred Heineman, but differing in that one pictured the Congressman and provided a 1-800 number while the other did not).

[208] The advertisements are: "Too Far," Mitchell Decl. ¶ 32 & Ex. 31 [6 PCS]; "1991," *id.* ¶ 34 & Ex. 33; "Raise," *id.* ¶ 35 & Ex. 35; "Votes," *id.*

In addition, Exhibit 1 shows that four more advertisements would have been captured by BCRA due to their airing within 30 days of the identified candidate's primary, but since all of the airings of three of these commercials would have been captured by BCRA's 60 day-window as well, I address only one of these advertisements in this Finding.[209]

1. "Too Far" was an advertisement which aired nationally on cable television and identified President William J. Clinton within 30 days of the Iowa primary in 1996. Mitchell Decl. ¶ 32, Ex. 1 at 17 [6 PCS].

2. During April 1996, the AFL-CIO ran a flight of advertisements entitled "1991" aimed at increasing the national minimum wage. *Id.* ¶ 34. Exhibit 1 shows that the AFL-CIO produced 19 versions of "1991," three of which ran within 30 days of an identified candidate's primary contest. *Id.* Ex. 1 at 17-20. In May 1996, the AFL-CIO ran four more

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¶ 35 & Ex. 36; "People," *id.* ¶ 35 & Ex. 38; "No," *id.* ¶ 35 & Ex. 39; "Minimum Wage," *id.* ¶ 36 & Ex. 42; "$5.15," *id.* ¶ 36 & Ex. 44; "Couple," *id.* ¶ 37 & Ex. 47; "Lady," *id* . ¶ 37 & Ex. 48; "Peace," *id.* ¶ 37 & Ex. 49; "Whither," *id.* ¶ 37 & Ex. 50; "Another," *id.* ¶ 38 & Ex. 53; "Edith," *id.* ¶ 40 & Ex. 58; "Pass," *id.* ¶ 50 & Ex. 94; "Support," *id.* ¶ 50 & Ex. 95; "Call," *id.* ¶ 50 & Ex. 98; "Failed," *id.* ¶ 50 & Ex. 99; "Liable," *id.* ¶ 50 & Ex. 100; "Soon," *id.* ¶ 50 & Ex. 100; "Basic," *id.* ¶ 50 & Ex. 102; "Label," *id.* ¶ 57 & Ex. 127; "Trust," *id.* ¶ 57 & Ex. 128; "Endure," *id.* ¶ 57 & Ex. 129; "Stand," *id.* ¶ 57 & Ex. 130; "Block," *id.* ¶ 58 & Ex. 137; "Help," *id.* ¶ 58 & Ex. 138; "Sky," *id.* ¶ 59 & Ex. 139; and "Protect," *id.* ¶ 59 & Ex. 140.

[209] These four advertisements are: "Job," Mitchell Decl. ¶ 61 & Exs. 1 (at 102), 141 [6 PCS] (All airings of "Job" took place within 60 days of the 2000 general election); "Barker," *id.* ¶ 53 & Ex. 116 (All airings of "Barker" took place within 60 days of the 2000 general election); "No Two Way," *id.* ¶ 41 & Ex. 59 (All airings of "No Two Way" took place within 60 days of the 2000 general election); and "Raiders," *id.* Ex. 1 at 36, 38-39, Ex. 58 at 10. Since the "Job," "Barker," and "No Two Way" airings would have been captured by BCRA's 60-day window, they are not addressed here but in Findings ¶¶ 2.11.3.2, 2.11.8.2.

flights of cookie-cutter advertisements related to legislation that would raise the minimum wage entitled "Raise," "Votes," "People," and "No." *Id.* ¶ 35. According to Exhibit 1, two versions of "Raise" were aired, one of which was aired within 30 days of the named candidate's primary, and 19 versions of "People" were run, two of which mentioned a candidate within 30 days of the candidate's primary. *Id.* Ex. 1 at 21-25. The AFL-CIO's data shows that five versions of "No" were aired, none during the 30 days prior to the primary of an identified candidate, and Exhibit 1 shows no airings of "Votes." *Id.* Ex. 1 at 22. In late June and July of 1996, the AFL-CIO ran two more flights of advertisements entitled "Minimum Wage" and "$5.15" on the same issue. *Id.* ¶ 36. Nine versions of "Minimum Wage" were aired, none of which implicated candidates within 30 days of their primary, while 14 versions of "$5.15" were aired, one which named a candidate within 30 days of the candidate's primary. *Id.* Ex. 1 at 17, 19, 21-22, 32-35.

3. Between late June and early August 1996, the AFL-CIO ran four flights of advertisements entitled "Couple," "Lady," "Peace," and "Whither," "intended to defeat the continuing efforts of the Republican Congress to reduce Medicare/Medicaid benefits as part of the FY 1997 federal budget legislation." *Id.* ¶ 37. The group ran 34 versions of "Couple," two of which mentioned candidates within 30 days of their primaries, and 27 versions of "Whither" were run, four of which fell within 30 days of a named candidate's primary contest. *Id.* Ex. 1 at 25-36. Five versions of "Lady," and four versions of "Peace" were run, but none of these advertisements ran within 30 days of an identified candidate's primary. *Id.* Ex. 1 at 29-34.

4. In late August and early September 1996, "the AFL-CIO sponsored another flight of advertisements entitled 'Another' in response to a series of advertisements run by business interest groups that called into question the AFL-CIO's

Medicare ads by claiming that the Republican budget would increase, rather than decrease, Medicare budgets." *Id.* ¶ 38. The group ran 26 versions of "Another," six of which ran within 30 days of a named candidate's primary contest. *Id.* Ex. 1 at 39-42.

5. In August of 1996, the AFL-CIO "sponsored a television and radio advertisement entitled "Edith" which was intended to gain support for legislation to protect the retirement savings of working families by applying the same protections to 401(k) plans as already applied to traditional defined benefit plans." *Id.* ¶ 40. Forty versions of "Edith" were broadcast, 12 of which identified candidates within 30 days of their primaries. *Id.* Ex. 1 at 36-39. Four versions of a radio advertisement on the same topic entitled "Raiders" were aired by the AFL-CIO, one of which would have been captured by BCRA's 30- day rule. *Id.* Ex. 1 at 36, 38-39.

6. In July 1998, the AFL-CIO "sponsored several flights of television and radio advertisements designed to generate support for HMO reform legislation." *Id.* ¶ 50. These advertisements were entitled "Pass," "Support," "Call," "Failed," "Liable," "Soon," and "Basic." *Id.* The group ran two versions of "Pass," six versions of "Support," three versions of "Failed," three versions of "Liable," and seven versions of "Basic." *Id.* Ex. 1 at 78-82. None of these advertisements was run within 30 days of a named candidate's primary. *Id.* Seventeen versions of "Call" were broadcast, two of which named federal candidates within 30 days of their primary, as did one of the three versions of "Soon." *Id.* Ex. 1 at 80-82.

7. From February through June 2000, the "AFL-CIO ran several flights of ads entitled 'Label,' 'Trust,' 'Endure,' and 'Stand' in opposition to President Clinton's proposal to provide permanent normal trade relations to China." *Id.* ¶ 57. The group ran 14 versions of "Label," two within 30 days of a named candidate's primary. *Id.* Ex. 1 at 92-93. Sixteen

versions of "Trust" were aired, three during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 93-97. Eighteen versions of "Endure" were broadcast, three of which aired within 30 days of the named candidate's primary. *Id.* Ex. 1 at 94-97. Neither of the two versions of "Stand" aired by the AFL-CIO named candidates within 30 days of their primary elections. *Id.* Ex. 1 at 97.

8. In June and July of 2000, the AFL-CIO "paid for a flight of radio advertisements entitled 'Block' aimed at pressuring the Senate to approve the Norwood-Dingell version of the Patient's Bill of Rights." *Id.* ¶ 58. Exhibit 1 shows one version of "Block" was aired, but not during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 86. "In August and September, with the bill still stalled in Congress, [the AFL-CIO] ran several flights of television advertisements entitled 'Help' targeting Republican Representatives who had voted against the [bill] when it passed the House in October, 1999, urging viewers to contact each of these Members and 'tell him he's on the wrong side.' . . . One of the flights of 'Help' ran between August 18 and September 6, 2000." *Id.* ¶ 58. Nine versions of "Help" were aired during this flight, two of which aired within 30 days of a named candidate's primary. *Id.* Ex. 1 at 100.

9. Finally, during July and August of 2000, "the AFL-CIO ran television advertisements entitled "Sky" and "Protect" naming approximately twelve different Representatives who had voted at the end of June to pass prescription drug legislation that failed to guarantee drug benefits under Medicare." *Id.* ¶ 59. Twelve versions of "Sky" were aired, one of which was broadcast during the 30 days before a named candidate's primary. *Id.* Ex. 1 at 97-98. Fourteen versions of "Protect" aired, three of which aired within 30 days of a named candidate's primary. *Id.* Ex. 1 at 98-99.

10. These examples constitute 336 cookie-cutter advertisements, 50 of which would have been affected by BCRA.

III. EMPIRICAL STUDIES ON CORRUPTION

In my Title I Findings, I briefly summarize the state of the empirical studies cited to by experts which attempt to demonstrate a link between political donations and political corruption. A more detailed analysis of these studies is presented below.

A. Some studies have attempted to show that PAC donations influence roll call votes. Defense expert Donald Green testifies that he knows of no statistically valid study conducted since 1990 correlating federally-regulated PAC contributions to candidates and roll call votes. Green Cross Exam. at 58 [JDT Vol. 9]; *see also id.* at 54-55 (noting that "the picture of evidence over a range of studies does not suggest a consistent relationship" between contributions and roll call votes); Bok Cross Exam. at 18-19 [JDT Vol. 3] (studies are "flawed"). Green also testifies that some studies have even found a negative correlation between contributions and roll call votes. *Id.* at 55. Defense expert Thomas Mann comments that these studies are

> often used to buttress the argument that political contributions do not corrupt the policy process. This is an odd inference, since it is based on studies of contributions that are limited as to source and size for the very purpose of preventing corruption or its appearance. PAC contributions are capped at $5,000 per election, an amount whose real value has shrunk by two-thirds since it was enacted in 1974. Are we to assume that studies of contributions of $50,000 or $500,000 or $5 million from corporations, unions and individuals would produce the same generally negative findings?

Mann Expert Report at 33. [DEV 1-Tab 1].

The experts testify that part of the reason the existing studies linking contributions to roll call votes are flawed is that "political scientists lack the means by which to observe and determine [*quid pro quo* bribery]." Sorauf Cross Exam. at 132 [JDT Vol. 31]; *see also* Green Cross Exam. at 67-68 [JDT Vol. 9] ("[T]he literature on the relationship between roll call votes and money is murky because the problem is an extremely difficult one to solve, statistically."). Plaintiffs' expert David Primo summarizes the studies linking contributions to roll call votes:

> [I]t is well established that PAC contributions flow disproportionately to incumbent office holders, majority party members, members of powerful committees and to members on committees with jurisdictions relative to the PAC sponsor. . . .—and you could say oh, it must be bribes. But in fact, once you get deeper in it, it just can't possibly be a fact that such little money is affecting the political process.

Primo Cross Exam. at 143-44 [JDT Vol. 27].

B. Other studies have attempted to link donations to other forms of legislative activity, such as committee voting, offering amendments, or filibustering. Defendants' expert Mann notes that there are "a myriad of ways in which groups receive or are denied favors beyond roll-call votes. Members can express public support or opposition in various legislative venues, offer amendments, mobilize support, help place items on or off the agenda, speed or delay action, and provide special access to lobbyists. They can also decline each of these requests." Mann Expert Report. at 33 [DEV 1-Tab 1]. One of these studies in particular,[210] which examines PAC contributions and legislative activity, has been found to be

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[210] Richard Hall & Frank Wayman, Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees, 84 American Political Science Review 797 (1990).

statistically unsound. *See* Green Cross Exam at 55 [JDT Vol. 9]; *see also id.* at 68-72 (noting the study does not account for lobbying activities); Primo Cross Exam. at 136-37 [JDT Vol. 27] ("I am not convinced by their paper . . . "); Snyder Rebuttal Report at 7-9 [2 PCS] (noting that Hall and Wayman's study "has three notable flaws"). Plaintiffs' expert David Primo concludes that "there is no clear, consistent and systematic evidence that contributions play a major role in the legislative process." Primo Cross Exam. at 142 [JDT Vol. 27]. Defendants' expert Derek Bok explains that "[t]he difficulty is, of course, that the ability of researchers to get at the behavior prior to a vote is severely limited since a lot of that is not public, and therefore, it's . . . inherently difficult to prove one way or another what effect PAC contributions would have on prevoting behavior." Bok Cross Exam. at 21 [JDT Vol. 3].

C. Other studies have attempted to establish empirically a link between donations and access to legislators. Plaintiffs' expert Primo finds "scant evidence in the political science literature that money secures access." Primo Rebuttal Report ¶ 13 [2 PCS]; *see also* FEC expert Herrnson Dep. in *RNC v. FEC* at 300 (testifying that existing studies on "access" are "kind of weak and wishy washy") [DEV 64-Tab 3]; Bok Cross Exam. at 35-37 [JDT Vol. 3] (noting that researchers studying PAC donations have failed to show that access has a significant impact on policy decisions); Green Cross Exam. at 93-95 [JDT Vol. 9] (unable to identify a study that shows PAC contributions lead to access to federal lawmakers). Defendants' experts Krasno and Sorauf note that "the absence of systematic data on access . . . prevents political scientists from searching for relationships between access and policy-makers' behavior." Krasno & Sorauf Expert Report at 5 [DEV 1-Tab 2].